DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-63 *** CAPITAL CASE ***
Title: Cory R. Maples, Petitioner
v.
Kim T. Thomas, Interim Commissioner, Alabama Department of Corrections
Docketed: July 12, 2010
Linked with 09A974
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (07-15187)
Decision Date: October 26, 2009
Rehearing Denied: February 9, 2010
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

Mar 10 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 21 2011	Petition GRANTED limited to Question 2 presented by the petition.
Mar 29 2011	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 29 2011	Consent to the filing of amicus briefs, in support of either party or ofneither party, received from counsel for the respondent.
Apr 6 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 18, 2011.
Apr 6 2011	The time to file respondent's brief on the merits is extended to and including June 30, 2011.
May 18 2011	Joint appendix filed. (Statement of costs filed)
May 18 2011	Brief of petitioner Cory R. Maples filed.
May 25 2011	Brief amicus curiae of Deborah A. DeMott filed.
May 25 2011	Brief amici curiae of The Constitution Project and Cato Institute filed.
May 25 2011	Brief amicus curiae of Alabama Criminal Defense Lawyers Association filed.
May 25 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
May 25 2011	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
May 25 2011	Brief amici curiae of Alabama Appellate Court Justices and Bar Presidents filed.
May 25 2011	Brief amici curiae of Legal Ethics Professors and Practitioners, et al. filed.
Jun 30 2011	Brief of respondent Kim T. Thomas, Interim Commissioner, Alabama Department of Corrections filed.
Jul 7 2011	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jul 7 2011	Brief amici curiae of Texas, et al. filed.
Jul 19 2011	SET FOR ARGUMENT ON Tuesday , October 4, 2011.
Aug 1 2011	Reply of petitioner Cory R. Maples filed.
Aug 2 2011	CIRCULATED.
Aug 19 2011	Record received from U.S.C.A. for the 11th Circuit. (1 envelope)
Aug 29 2011	Record received from U.S.D.C. for the District of Alabama. (3 boxes)
Oct 4 2011	Argued. For petitioner: Gregory G. Garre, Washington, D. C. For respondent: John C. Neiman, Jr., Solicitor General, Montgomery, Ala.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-63 JUL 9 - 2010

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

In this capital case, the divided Eleventh Circuit held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender—Left Firm" written on an envelope. The questions presented are as follows:

1. Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other circuits—that the purported state procedural default rule is "adequate" as a matter of federal law to bar federal habeas review of serious constitutional claims, where the court of appeals disregarded state case law allowing untimely appeals in analogous circumstances, reconstructed state law based on distinctions not drawn by the state courts themselves, and relied on cases decided after the asserted default.

2. Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other courts—that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Trial Court Proceedings and Direct Appeal 3

B. State Post-Conviction Proceedings 5

C. Federal Habeas Proceedings 8

REASONS FOR GRANTING THE WRIT 9

I. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT THE STATE'S ALLEGED DEFAULT RULE IS ADEQUATE WARRANTS THIS COURT'S REVIEW 12

A. The Eleventh Circuit's Decision Directly Conflicts With This Court's Precedents 13

B. The Eleventh Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals 19

C. The Grant Of Certiorari In *Walker v. Martin* Heightens The Need For Review Here 21

TABLE OF CONTENTS—Continued

Page

II. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT MAPLES FAILED TO SHOW CAUSE WARRANTS REVIEW 24

A. The Eleventh Circuit's Decision Conflicts With *Jones v. Flowers* And Other Precedents 24

B. The Eleventh Circuit's Decision Goes Well Beyond The Reach Of *Coleman v. Thompson* 27

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT 32

CONCLUSION 33

APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Eleventh Circuit, *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009) 1a

Memorandum of Opinion of the United States District Court for the Northern District of Alabama, *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Sept. 29, 2006) 33a

TABLE OF CONTENTS—Continued

Page

Memorandum Opinion and Order of the United States District Court for the Northern District of Alabama Denying Reconsideration Under Rule 59(e), *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Sept. 26, 2007) 203a

Order of the United States Court of Appeals for the Eleventh Circuit Granting Leave to Expand Certificate of Appealability, *Maples v. Allen*, No. 07-15187-P (11th Cir. Aug. 15, 2008) 219a

Order of the United States District Court for the Northern District of Alabama Granting Certificate of Appealability, *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. July 3, 2008) 220a

Order of the Circuit Court of Morgan County of Alabama Denying Motion to Reissue May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Sept. 3, 2003) 222a

Order of the Court of Criminal Appeals of Alabama Denying Petition for Writ of Mandamus, *Ex parte Maples*, No. CR-03-0021 (Ala. Crim. App. Jan. 23, 2004) 226a

TABLE OF CONTENTS—Continued

Page

Order of the Supreme Court of Alabama Denying Petition for Writ of Mandamus, *Ex parte Maples*, No. 1030701 (Ala. Sept. 3, 2004) 237a

Order of the United States Court of Appeals for the Eleventh Circuit Denying Rehearing, *Maples v. Allen*, No. 07-15187-P (11th Cir. Feb. 9, 2010) 238a

Letter concerning Extension of Time for Filing Petition for Writ of Certiorari, *Maples v. Allen*, Application No. 09A974 (U.S. Apr. 19, 2010) 240a

U.S. Constitution amendment VI 242a

U.S. Constitution amendment XIV, § 1 ..... 243a

28 U.S.C. § 2254 ..... 244a

Alabama Rule of Criminal Procedure 1.2 ..... 248a

Alabama Rule of Criminal Procedure 32.1 (1990) 249a

Alabama Rule of Appellate Procedure 4(a)(1) 251a

TABLE OF CONTENTS—Continued

Page

Letter from State of Alabama Office of Attorney General to Cory R. Maples regarding expiration of right to appeal to the Alabama Court of Criminal Appeals, *Maples v. State*, No. CC-95-84260 (Aug. 13, 2003) 253a

Affidavit of John G. Butler, attachment to Motion to Reissue Court's May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Aug. 26, 2003) 255a

Affidavit of Marc de Leeuw, attachment to Motion to Reissue Court's May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Aug. 26, 2003) 257a

TABLE OF AUTHORITIES

Page(s)

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 31

Alverson v. State,
531 So. 2d 44 (Ala. Crim. App. 1988) 15

Baldayaque v. United States,
338 F.3d 145 (2d Cir. 2003) 29

Barr v. City of Columbia,
378 U.S. 146 (1964) 18

Beard v. Kindler,
130 S. Ct. 612 (2010) 2, 11, 12, 21

Carlson v. Green,
446 U.S. 14 (1980) 25

Coleman v. Thompson,
501 U.S. 722 (1991) 11, 27, 28

Combs v. Coyle,
205 F.3d 269 (6th Cir.), *cert. denied*, 531
U.S. 1035 (2000) 19

Davis v. Wechsler,
263 U.S. 22 (1923) 19

Denko v. INS,
351 F.3d 717 (6th Cir. 2003) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Fadiga v. Attorney General of the United States,
488 F.3d 142 (3d Cir. 2007) 31

Fautenberry v. Mitchell,
515 F.3d 614 (6th Cir.), *cert. denied*, 129 S. Ct. 412 (2008) 20

Fields v. Calderon,
125 F.3d 757 (9th Cir.), *cert. denied*, 523 U.S. 1132 (1998) 20

Fountain v. State,
842 So. 2d 719 (Ala. Crim. App. 2000), *aff'd in relevant part, Ex parte Fountain*, 842 So.2d 726 (Ala. 2001) 13, 14, 15

Gosier v. Welborn,
175 F.3d 504 (7th Cir.), *cert. denied*, 528 U.S. 1006 (1999) 20

Hathorn v. Lovorn,
457 U.S. 255 (1982) 18

Holland v. Florida,
No. 09-5327, 2010 WL 2346549 (U.S. June 14, 2010) 27, 28, 29, 31

House v. Bell,
547 U.S. 518 (2006) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Ex parte Ingram,
675 So. 2d 863 (Ala. 1996) 5

James v. Kentucky,
466 U.S. 341 (1984) 12, 18

Jamison v. Lockhart,
975 F.2d 1377 (8th Cir. 1992) 30

Jenkins v. State,
12 So. 3d 166 (Ala. Crim. App. 2008) 15

Johnson v. Mississippi,
486 U.S. 578 (1988) 18

Jones v. Flowers,
547 U.S. 220 (2006) 10, 11, 25, 26, 27

Jones v. Sussex I State Prison,
591 F.3d 707 (4th Cir. 2010) 19

Kennedy v. Louisiana,
128 S. Ct. 2641 (2008) 32

Lawrence v. Florida,
549 U.S. 327 (2007) 28

Lee v. Kemna,
534 U.S. 362 (2002) 10, 12, 17, 18

Manning v. Foster,
224 F.3d 1129 (9th Cir. 2000) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Marshall v. State,
884 So. 2d 898 (Ala. Crim. App. 2002), rev'd *on other grounds*, 884 So. 2d 900 (Ala. 2003) 5, 14, 15, 16

Marshall v. State,
884 So. 2d 900 (Ala. 2003) 14, 17

Martin v. Walker,
357 F. App'x 793 (9th Cir. 2010), *cert. granted*, No. 09-996, 2010 WL 621406 (U.S. June 21, 2010) 22

Melson v. State,
902 So. 2d 715 (Ala. Crim. App. 2004) 14

Munaf v. Geren,
128 S. Ct. 2207 (2008) 31

Murray v. Carrier,
477 U.S. 478 (1986) 24, 32

Murray v. Giarratano,
492 U.S. 1 (1989) 32

NAACP v. Alabama ex rel. Flowers,
377 U.S. 288 (1964) 12

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 12, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Nehad v. Mukasey,
535 F.3d 962 (9th Cir. 2008) 31

Porter v. State,
2 S.W.3d 73 (Ark. 1999) 30

Puckett v. State,
834 So. 2d 676 (Miss. 2002) 30

Rafiyev v. Mukasey,
536 F.3d 853 (8th Cir. 2008) 31

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 24

Rouse v. Lee,
339 F.3d 238 (4th Cir. 2003), *cert. denied*,
541 U.S. 905 (2004) 29

Saleh v. United States Department of Justice,
962 F.2d 234 (2d Cir. 1992) 31

Scott v. Schriro,
567 F.3d 573 (9th Cir.), *cert. denied*, 130 S.
Ct. 1014 (2009) 19, 20

Shephard v. State,
598 So. 2d 39 (Ala. Crim. App. 1992) 15

Smith v. Mullin,
379 F.3d 919 (10th Cir. 2004) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Sones v. Hargett,
61 F.3d 410 (5th Cir. 1995) 19

Tang v. Ashcroft,
354 F.3d 1192 (10th Cir. 2003) 31

Thompson v. State,
860 So. 2d 907 (Ala. Crim. App. 2002) 14, 15

Trest v. Cain,
522 U.S. 87 (1997) 19

Wainwright v. Sykes,
433 U.S. 72 (1977) 24

Walker v. Attorney General of the United States,
167 F.3d 1339 (10th Cir.), *cert. denied*, 528
U.S. 987 (1999) 20

Ex parte Weeks,
611 So. 2d 259 (Ala. 1992) 17

Williams v. State,
44 S.W.3d 464 (Tenn. 2001) 30

Yee v. City of Escondido,
503 U.S. 519 (1992) 25

Zeru v. Gonzales,
503 F.3d 59 (1st Cir. 2007) 31

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

Alabama Code § 13A-5-46(f) 3

Alabama Rule of Appellate Procedure 4(b)(1) 5

Alabama Rule of Criminal Procedure 32.1(f) (1990) 5, 13

OTHER AUTHORITY

Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079 (2003) 33

Nancy J. King et al., *Final Technical Report: Habeas* Litigation *in U.S. District Courts* 48 (2007) 32

Eve Brensike Primus, *A Structural Vision of Habeas* Corpus, 98 Calif. L. Rev. 1 (2010) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Recent Case, *Federal Courts—Habeas Corpus—Fourth Circuit Fails To Reach a Judgment on the Merits of a* Constitutional *Claim Based on the State Procedural Default Doctrine.—McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007)*, 120 Harv. L. Rev. 2246 (2007) 21

Restatement (Second) of Agency (1958) 28

Restatement (Third) of Agency (2006) 28

Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 Colum. L. Rev. 243 (2003) 12

Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Debate*, 91 Cornell L. Rev. 541 (2006) 12

In the
Supreme Court of the United States

NO.

CORY R. MAPLES,

Petitioner,

V.

RICHARD ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cory R. Maples respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-32a) is reported at 586 F.3d 879 (11th Cir. 2009). The opinion and orders of the district court denying habeas relief (App.33a-218a) are not reported. The orders of the district court granting and expanding (App.219a-21a) the certificate of appealability are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2009. App.1a. A timely petition for

rehearing was denied on February 9, 2010. App.238a-39a. On April 19, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 9, 2010. App.240a-41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix at 242a-52a.

STATEMENT OF THE CASE

This case raises exceptionally important questions concerning the gateway standards governing access to federal habeas relief for petitioners challenging a state court conviction or sentence under the Constitution. The proper understanding of these standards is especially critical in capital cases such as this where an individual's life is at stake. The divided Eleventh Circuit decision below fundamentally misconstrues—and debases—these standards in concluding that the procedural default rule at issue is "adequate" as a matter of federal law, and that petitioner could not establish "cause" to excuse any default. The court's decision directly conflicts with the decisions of this Court and other courts in several significant respects, and exacerbates the uncertainty that already exists over the standards governing procedural defaults. This Court's recent grant of certiorari in *Walker v. Martin*, No. 09-996, and decision in *Beard v. Kindler*, 130 S. Ct. 612 (2010), underscore the importance of these standards, and this case warrants certiorari to provide needed guidance in these critical areas of law.

A. Trial Court Proceedings and Direct Appeal

1. In 1997, an Alabama jury found Maples guilty of two counts of capital murder, intentional murder during a robbery and intentional murder of two or more persons. The jury recommended death by a vote of 10-2—one vote shy of the number that would have barred the jury from issuing such a recommendation under state law. Ala. Code § 13A-5-46(f). The trial court sentenced Maples to death. App.1a.

a. Because of trial counsel's gross ineffectiveness, key facts concerning the offenses and appropriateness of a death sentence were never explored. At trial, the State introduced evidence that Maples—who had a history of serious drug and alcohol dependence, but no prior record of violent crime—had been drinking heavily and using drugs on the night of the offense. For example, one of the State's witnesses testified that she saw crystal methamphetamine and crack on Maples shortly after the shootings and that Maples told her he had been "doing crystal meth and crack" that evening. R.1894.[1] Numerous other witnesses testified that Maples's behavior before the shootings was abnormal, R.1848, R.1858-59, and that he was "hyper," acting "drunk," or not making sense. R.1848, 1858, 1803.

The jury would have been entitled to conclude that Maples lacked the mental state necessary for capital murder because of voluntary intoxication. But Maples's attorneys failed to investigate evidence that Maples had been drinking and using drugs, presented no evidence at trial that Maples was intoxicated at the

---

[1] "R." refers to the record for this case in the Circuit Court of Morgan County, Alabama, Case No. CC95-842, as submitted to the Court of Criminal Appeals of Alabama, Case No. CR-03-0021.

time of the shootings, and did not even request an instruction on voluntary intoxication or manslaughter. App.20-22a. Maples's attorneys instead told the jury that Maples was *not* intoxicated—even though they later told the jury during the penalty phase that "but for the alcohol and drug usage on this occasion, [the shooting] would probably not have happened." R.3086.

Worse still, Maples's attorneys told the jury during closing argument that "[w]hat we have here is ... [Maples] walking out to the car and in an instantaneous rush killing two people," R.2918, and "conceded ... there was a loss of life caused intentionally at the hand of Corey [sic] Maples," R.2914. In other words, far from providing an effective defense, Maples's state-provided attorneys essentially professed Maples's guilt to capital murder under Alabama law.

b. The penalty phase began following a lunch break on the same day that the jury handed down its verdict in the guilt phase and lasted the afternoon with closing arguments the following morning. During the hearing, Maples's attorneys—who had never previously tried the penalty phase of a capital case—admitted that, owing to their inexperience, they "may appear to be stumbling around in the dark." R.3081-82. Their affirmative case amounted to unprepared testimony from three family members and the testimony of a psychologist who had met with Maples months earlier for four hours and made no "formal diagnosis." R.3165.

Maples's attorneys failed to investigate numerous matters highly relevant to sentencing, including Maples's abusive childhood and abandonment by his mother, Maples's mental health and history of depression and suicide attempts as well as the history of mental illness in Maples's family, and his extensive

history of alcohol and substance abuse including abuse of crack cocaine, crystal methamphetamine, and LSD. Nor did Maples's attorneys investigate Maples's character, cooperation with the police, and voluntary admission to a drug treatment program.

2. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and sentence. App.2a. Consistent with settled Alabama law, Maples was not permitted on appeal to challenge the effectiveness of the assistance that he received from counsel at trial. *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

B. State Post-Conviction Proceedings

1. Under Rule 32.1 of the Alabama Rules of Criminal Procedure, a defendant convicted of a criminal offense may bring a post-conviction challenge in state court arguing that his conviction or sentence violates federal or state law. Under Alabama Rule of Appellate Procedure 4(b)(1), the time for appealing an adverse decision in "a criminal case" is generally 42 days. Rule 32.1(f), however, authorizes a request for relief when "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). Alabama courts have excused the failure to file a timely appeal of the denial of a Rule 32.1 petition in circumstances in which the failure was without fault on petitioner's part. *See, e.g.*, *Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002), *rev'd on other grounds*, 884 So. 2d 900 (Ala. 2003); *infra* at 13.

2. On August 1, 2001, Maples—represented by new out-of-state pro bono counsel—filed a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32.1, raising ineffective assistance of counsel

and other claims. Maples was represented by Clara Ingen-Housz and Jaasi Munanka, attorneys at the law firm of Sullivan & Cromwell in New York, who represented Maples in their individual capacities. App.255a. John Butler, a local attorney, appeared for the sole purpose of admitting Ingen-Housz and Munanka *pro hac vice*. He had no substantive involvement in the case. App.255a-56a, 257a.

Respondent moved to dismiss the petition. The state trial court initially denied respondent's motion to dismiss in December 2001, and Maples's requests for discovery remained pending before the court. Approximately 18 months later, on May 22, 2003, while Maples was awaiting rulings on his discovery motions, the trial court issued an order denying the petition outright. App.3a. Through no fault of his own, Maples never received timely notice of the trial court's order.

The trial court clerk sent copies of the order individually addressed to Maples's pro bono attorneys of record (Ingen-Housz and Munanka) and to Butler. App.222a-23a. By this time, however, both Ingen-Housz and Munanka had left Sullivan & Cromwell—without notice to the court or substitution of counsel. App.222a. Copies of the court's order were returned to the trial court clerk unopened with "Return to Sender—Attempted Unknown" stamped on the envelope addressed to Munanka, and "Return to Sender—Attempted Not Known" stamped on the envelope addressed to Ingen-Housz and "Return to Sender—Left Firm" written on the front. App.223a. Butler received the order, but because he had "no substantive involvement" in the case, he did nothing. App.255a-56a.

After receiving the unopened and unclaimed envelopes containing the order, the trial court clerk did nothing. The clerk made no further effort to contact pro bono counsel (or anyone else at their former law firm), local counsel, or Maples. There matters stood and the 42-day period for appeal under Alabama Rule of Appellate Procedure 4(b)(1) passed. On August 13, 2003, about a month after the deadline had passed, the State's attorney sent a letter to Maples—not his attorneys—to "inform [him] of recent events" concerning the dismissal of his Rule 32 petition and to advise him that the time for filing a federal habeas corpus petition would soon expire. App.253a.

When Maples learned of the missed deadline, he immediately informed his step-mother, who contacted Sullivan & Cromwell. Other attorneys at that firm then sought leave to file an appeal notwithstanding the missed deadline, but that request was denied. App.5a.

3. The trial court deemed the notice sent to counsel sufficient (even if not received) and stated, "[i]f the petitioner is entitled to an out-of-time appeal, let the Court of Appeals so rule." App.224a. Although the Alabama Court of Criminal Appeals recognized that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," it concluded that the State "was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition" and that Maples had failed to show a violation of due process. App.234a, 236a. In defending that judgment, respondent told the Alabama Supreme Court that petitioner "may still present his postconviction claims to [the] court" on federal habeas. App.18a. The Alabama Supreme Court affirmed in a one-sentence order, and this Court denied certiorari.

C. Federal Habeas Proceedings

1. On August 29, 2003, Maples filed a federal habeas petition raising, *inter alia*, ineffective assistance of counsel claims. That petition was stayed pending the state court proceedings, and amended in May 2005. Notwithstanding respondent's representation to the Alabama Supreme Court that Maples "may still present his postconviction claims" on federal habeas, App.18a, respondent argued in federal court that Maples defaulted on his ineffective assistance of counsel claims due to the missed deadline.

The district court acknowledged that the Alabama courts had previously permitted an out-of-time appeal from the denial of a Rule 32 petition where the petitioner claimed that he "had not received the order dismissing his petition and that his counsel was ineffective for failing to inform him of the dismissal." App.53a (discussing *Marshall*). However, the court held that Maples "has not established that the State of Alabama's interpretation of Rule 32.1(f)'s 'no fault' provision for petitioners in Maples's posture is *not* firmly established or regularly followed." App.54a-55a (emphasis added). The court further held that Maples could not show "cause" to overcome a procedural default. App.55a. The court nevertheless authorized an appeal on these issues, recognizing that "[j]urists of reason" could "debat[e]" whether the alleged default rule was "firmly established and regularly followed" and whether Maples had established cause. App.221a.

2. A divided panel of the Eleventh Circuit affirmed. The panel declined to consider the text of Rule 32.1's "no fault" provision. Even though no decided case in Alabama has ever articulated such a framework, the panel majority held that Maples had

notice of the purported default rule because "Alabama has granted out-of-time appeals in only three limited circumstances." App.13a. The court then sought to articulate such "exceptions" based on a *post hoc*, fact-specific rendering of various Alabama cases, emphasizing distinctions that (it said) Alabama courts "appeared" to draw, though the decisions themselves did not emphasize such grounds, and relying on cases decided after the alleged default. App.13a-16a. The panel majority then held that Maples failed to show cause on the ground that attorney performance can never constitute "cause" to excuse a default. App.17a-18a.

Judge Barkett dissented. She concluded that the alleged default rule "is not 'adequate' pursuant to the Supreme Court's definition of that term." App.27a. She explained that the Alabama courts had allowed untimely appeals on "indistinguishable facts" and that the panel majority based its analysis on distinctions that the Alabama courts themselves have not applied. App.28a-31a. She also concluded that equity, if not the Constitution, required that Maples be afforded federal review of his claims given that, accepting his allegations as true, he had raised a serious ineffective assistance of counsel claim that would go unreviewed for reasons involving no fault of his own. App.30a-31a.

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions governing the gateway standards for securing federal habeas review of the constitutionality or legality of a state conviction or sentence. The divided Eleventh Circuit decision below holding that petitioner is barred from seeking federal habeas relief is seriously flawed and conflicts with decisions of this Court and other

courts of appeals in several important respects. What is more, the decision raises the shocking prospect that a man may be executed without any federal court review of serious constitutional claims due to a series of events for which all agree he was blameless and notwithstanding the State's own failings in the purported default. Certiorari is warranted to review two overriding questions raised by that ruling.

The first concerns when a state default rule is "adequate" to bar federal habeas review. This Court has held that a state rule is adequate only when it was "'firmly established and regularly followed'" at the time of the alleged default, *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citations omitted), but courts have divided in applying that standard. To hold that this standard was satisfied here, the Eleventh Circuit overlooked the text of the Alabama rule, relied on cases decided *after* the alleged procedural default, and read into the extant Alabama cases distinctions that Alabama cases do not apply. That approach conflicts with decisions of this Court and other circuits, which make clear that federal courts may not recognize a "firmly established" or "regularly followed" rule on the basis of distinguishable case law or *post hoc* reinterpretations. And the Eleventh Circuit's decision conflicts with decisions holding that the *State*—not the inmate—bears the burden of proving that a rule is adequate.

The second question concerns when a petitioner has demonstrated "cause" to excuse any default for federal purposes. This Court has held that, when the loss of a home is at stake, state officials cannot just do nothing when an important notice is returned unopened, but instead must make further efforts to provide notice. *Jones v. Flowers*, 547 U.S. 220 (2006). It follows that

the State may not "shrug [its] shoulders ... and say 'I tried'" when a man's *life* is at stake. *Id.* at 229. Yet the Eleventh Circuit did not account for the State's own involvement in the default. Moreover, the Eleventh Circuit short-circuited the inquiry into cause by concluding that *Coleman v. Thompson*, 501 U.S. 722 (1991), governed since Maples was represented by counsel. App.17a. But *Coleman* does not govern where, as here, an attorney no longer functions as an agent at the time of the alleged default. As other courts have recognized, in such circumstances, a client is not responsible for an attorney's malfeasance.

As the dissent below recognized, petitioner presented strong claims for ineffective assistance of counsel. App.30a-31a & n.3. Those claims would have been heard if the Eleventh Circuit had properly followed this Court's precedents or this case had arisen in other circuits that have addressed these threshold issues in a different fashion. The fact that a man may be executed in these circumstances without any federal review of those claims ought to be enough to merit this Court's review. But the questions presented are recurring and of immense importance to the thousands of individuals who annually seek federal habeas review. Moreover, the first question presented concerns an area of law that Justices of this Court, *e.g.*, *Beard v. Kindler*, 130 S. Ct. 612, 619-21 (2009) (Kennedy, J., joined by Thomas, J., concurring), as well as many commentators, *infra* at 12, have recognized is urgently in need of clarification by this Court.

I. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT THE STATE'S ALLEGED DEFAULT RULE IS ADEQUATE WARRANTS THIS COURT'S REVIEW

To provide an "adequate" basis for barring federal habeas review, a state procedural rule must be "clear" at the time of the asserted default. *James v. Kentucky*, 466 U.S. 341, 346 (1984). To meet that requirement, a rule must be "'firmly established and regularly followed.'" *Lee*, 534 U.S. at 376 (citation omitted); *accord Beard*, 130 S. Ct. at 617; *James*, 466 U.S. at 348. Federal habeas review may not be denied on the basis of state law procedural impediments that did not provide the defendant with fair notice or that are novel, arbitrary, inconsistent, or unpredictable in application. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964).

As explained below, the federal courts have divided on the proper contours of these basic requirements. The divided Eleventh Circuit decision below conflicts with the decisions of this Court and other courts in numerous respects and exacerbates the widespread confusion that already exists concerning when a state default rule is adequate. *See, e.g.*, Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 Colum. L. Rev. 243, 315 (2003) (discussing the lack of "consistent standards for adequacy review"); *see also* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Debate*, 91 Cornell L. Rev. 541, 559 n.106 (2006) (case law on procedural defaults is "extraordinarily difficult"); Eve Brensike Primus, *A*

Structural Vision of Habeas Corpus, 98 Calif. L. Rev. 1, 1 (2010) (case law is "unworkable").

A. The Eleventh Circuit's Decision Directly Conflicts With This Court's Precedents

1. The Eleventh Circuit's conclusion in this case that there was a "firmly established and regularly followed" Alabama rule against allowing untimely appeals in petitioner's circumstances strips the adequacy requirement of all force. App.12a. The Alabama rule at issue has none of the qualities of a "firmly established and regularly followed" rule. Even as described by the Eleventh Circuit, the rule is riddled with *ad hoc* exceptions and evolving. And as a consequence, Maples lacked the requisite notice of that rule at the time it was invoked to bar his claims.

The text of Rule 32.1 itself has been a source of confusion, even to Alabama courts. In uncabined terms, the rule expressly states that a defendant may seek Rule 32 relief where "[t]he petitioner failed to appeal within the prescribed time ... and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). At the time of the alleged default, Alabama courts had recognized that, while Rule 32 did not "specifically provide for an out-of-time appeal from the denial of a Rule 32 petition" (as opposed to an order on direct review), "neither do the Rules specifically prohibit such relief." *Fountain v. State*, 842 So. 2d 719, 721 (Ala. Crim. App. 2000), *aff'd in relevant part, Ex parte Fountain*, 842 So. 2d 726 (Ala. 2001). Moreover, Alabama courts had stated that Rule 32.1(f) should be interpreted in light of Alabama Rule of Criminal Procedure 1.2, which instructs courts to construe the

rules to promote "fairness" and "protect the rights of individuals." *See id.* at 721-22.[2]

Maples could reasonably have understood Rule 32.1(f) to authorize relief from a missed Rule 32 appeal deadline through no fault of his own—and indeed many then-extant Alabama court decisions took that very position at the time of the events at issue. *See, e.g., id.* at 720 (answering in the affirmative question "whether Rule 32 ... permits an out-of-time appeal from the denial of a petition for post-trial relief"); *accord Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002) (*Marshall*); *Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002).

The divided Eleventh Circuit nevertheless held that the state courts have "routinely" *denied* untimely appeals from the denial of a Rule 32 petition. App.12a. But the cases the panel majority cited are readily distinguishable. *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004), post-dated *Marshall v. State*, 884 So. 2d 900 (Ala. 2003) (*Marshall II*)—and Maples's alleged default—and simply followed *Marshall II*'s holding that the prisoner must use mandamus. Maples, by contrast, indisputably invoked the now-correct mandamus procedure in seeking review of the denial of his Rule 32 petition. App.5a. The other cases involved situations in which Alabama courts found that the

---

[2] In September 2003—after the procedural default at issue in this case—the Alabama Supreme Court held that "[s]ubsection (f) contemplates the appeal from a conviction or sentence, but not an appeal from an adverse ruling in a collateral proceeding (such as a Rule 32 petition)." *Marshall v. State*, 884 So. 2d 900, 904 n.4 (Ala. 2003). As the dissenting justice observed, the effect of that ruling was to hold, "without citation to authority, ... that this rule does not mean what it says." *Id.* at 907 (Johnstone, J., dissenting).

inmate was at fault for missing the deadline, and thus did not satisfy the "no fault" rule. *Shephard v. State*, 598 So. 2d 39, 40 (Ala. Crim. App. 1992); *Alverson v. State*, 531 So. 2d 44, 45 (Ala. Crim. App. 1988). Here, all agree that Maples was *not* at fault for the missed deadline.

At the same time, the Eleventh Circuit refused to acknowledge that Alabama courts have consistently *allowed* untimely appeals from the denial of a Rule 32 petition in circumstances where the petitioner was not at fault for the missed deadline—and in situations where the petitioner was proceeding with counsel as well as where he was proceeding *pro se*. *See, e.g.*, *Marshall*, 884 So. 2d at 898-99; *Fountain*, 842 So. 2d at 721-24; *Thompson*, 860 So. 2d at 910; *Jenkins v. State*, 12 So. 3d 166, 166-67 (Ala. Crim. App. 2008).

The Eleventh Circuit's analysis of the *Marshall* case epitomizes the problems with its treatment of state law. As the dissent below explained, in *Marshall* the Alabama Court of Criminal Appeals—relying on prior case law, including *Fountain*—*allowed* an out-of-time appeal from the denial of a state habeas petition based on facts that are "indistinguishable" from those here. App.30a. Like Maples, Marshall was formally represented by counsel but nevertheless did not receive timely notice of the denial of his Rule 32 petition because (according to Marshall) his attorney improperly failed to notify him of the ruling. *Marshall*, 884 So. 2d at 898-99; App.28a (dissent).

The Eleventh Circuit sought to distinguish *Marshall* on the ground that the Alabama appellate court "*appeared* to find" that the court clerk "assumed a duty to serve Marshall personally in prison" based on various *pro se* motions Marshall had filed. App.14a

(emphasis added). But as the dissent below explained, that interpretation is entirely speculative; the panel majority's use of "appear[s]" recognizes that the *Marshall* court itself did not invoke such a distinction in allowing the out-of-time appeal. App.28a-30a. The *Marshall* court nowhere relied on any assumed duty on the part of the clerk or on the fact that Marshall may have made some *pro se* filings. The court instead based its holding on the fact that Marshall had shown that his failure to appeal was "through no fault of his own," since "he had never received notice of the circuit court's dismissal of his [petition]." 884 So.2d at 898-99.[3]

The Eleventh Circuit based its reading of *Marshall* on language taken out of context from a subsequent decision by the Alabama Supreme Court in that case, which was decided *after* Maples's alleged default. App.14a-15a. But the *Marshall II* court did not remotely hold, as the Eleventh Circuit would have it, that Marshall was entitled to relief only because "the state circuit court clerk assumed a duty to serve Marshall personally in prison" due to his "'numerous *pro se* filings.'" App.14a (citation omitted). *Marshall II* did not revisit the facts of Marshall's case, or whether he was substantively entitled to relief, at all. The only holding of *Marshall II* was that he should have used mandamus rather than Rule 32.1(f). The language about *pro se* filings and clerks assuming duties was not referring to Marshall's case but was simply a quote from a different case, holding that *procedural due process* was violated when a clerk

---

[3] Even if *Marshall* could be interpreted to turn on the presence of a duty to notify, such a duty existed here. *See infra* at 24-27; App.234a (recognizing basic "duty to notify").

assumed a duty to notify a defendant about a trial date and then failed to fulfill it. The *Marshall II* court relied on that case only to support its holding that mandamus was the proper remedy. *See Marshall II*, 884 So. 2d at 903 (quoting *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992)). And in any event, *Marshall II* was issued several months *after* the events at issue, and thus could not have provided any notice to Maples at the time of the alleged default or be used to show that any rule was "firmly established" at that time.

2. The divided Eleventh Circuit's decision directly conflicts with this Court's decisions. In *Lee*, this Court refused to find a state default rule adequate where, among other things, there was no published decision applying the purported rule in the circumstances presented, and where the cases relied on by the State were "distinguishable." 534 U.S. at 382 & n.13. In stark contrast, the Eleventh Circuit below refused to account for published decisions *allowing* out-of-time appeals in analogous circumstances and grounded its adequacy finding on case law that both is readily distinguishable and post-dates the events at issue. *See supra* at 14. The extended debate among the court below over the meaning of *Marshall*—which is longer than the *Marshall* decision itself—alone underscores the absence of a discernible rule in May 2003 against allowing untimely appeals when, as here, the petitioner is not at fault. *Cf. Lee*, 534 U.S. at 378-80.

The Eleventh Circuit's *post hoc* effort to pigeonhole Alabama cases into its own newly-invented tripartite framework also conflicts with this Court's decisions. This Court has explicitly repudiated efforts to manufacture a firmly established and regularly followed default rule by reconceiving the case law "in

retrospect" as "form[ing] part of a consistent pattern." *Patterson*, 357 U.S. at 457. And the exception-riddled framework that the Eleventh Circuit conceived *post hoc* is on its own terms the antithesis of a firmly established and regularly followed rule.

The Eleventh Circuit's decision also conflicts with this Court's precedents on when a state rule is "regularly followed." *James*, 466 U.S. at 348-49. In *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964), for example, this Court held that no adequate state ground barred review of various breach-of-peace convictions because the South Carolina Supreme Court had applied the disqualifying rule at issue in a manner inconsistent with contemporaneous cases. *See also Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). In addition to *Marshall*, where relief was allowed when the failure of notice was alleged to be solely the result of attorney negligence, the Alabama courts have granted relief in multiple cases where the petitioner was not at fault and fault for the prisoner's lack of notice instead appeared to rest with the court clerk, or was shared between the court clerk and counsel. *Supra*, 14.

4. Finally, this Court has recognized that, even when the State can show a firmly established rule, "[t]here are ... exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376. This is such a case. Maples bears no fault for the missed deadline, and the State itself is a cause of the default given its failure to do anything when it learned that petitioner's *pro bono* attorneys of record never received notice of the denial of his Rule 32 petition. *See infra*, 25-26. Indeed, the

State had no difficulty notifying Maples immediately *after* the appeal period had lapsed. App.253a. Its attempt to preclude federal review in these circumstances reflects a "gotcha" mentality that this Court long ago repudiated. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

B. The Eleventh Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals

The Eleventh Circuit's opinion also conflicts with the decisions of other courts of appeals in a number of important respects that go to the heart of the federal adequacy requirement and the nature of the inquiry demanded by this Court's precedents.

1. The courts below impermissibly placed on the habeas petitioner the burden of establishing that the purported state default rule is *inadequate*. App.16a. Consistent with the fact that procedural default is "a 'defense' that the State is 'obligated to raise,'" *Trest v. Cain*, 522 U.S. 87, 89 (1997), however, other circuits have held that the State bears the burden of proving that an asserted default rule was adequate. *See Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010); *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.), *cert. denied*, 130 S. Ct. 1014 (2009); *Smith v. Mullin*, 379 F.3d 919, 927 (10th Cir. 2004); *Combs v. Coyle*, 205 F.3d 269, 276-77 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000). *But see Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995) (presuming that a "state court's reliance on a procedural bar functions as an independent and adequate ground in support of the judgment" unless

the *petitioner* can show otherwise). The proper allocation of the burden of proof in determining the adequacy of a state rule is crucial and, as underscored by the hairsplitting in which the Eleventh Circuit engaged in its analysis of Alabama case law, was almost certainly outcome determinative here.

2. The decision below further conflicts with the decisions of other circuits on when a state rule is adequate. Even accepting the Eleventh Circuit's characterization of Alabama case law, it describes a jurisprudence riddled with *ad hoc* exceptions and unpredictable case-by-case development. In other circuits, the fact that a rule is "*subject to a [growing] number of exceptions*" would have compelled the conclusion that it is "*not* an adequate state ground to bar federal habeas review." *Fields v. Calderon*, 125 F.3d 757, 763 (9th Cir.) (second emphasis added), *cert. denied*, 523 U.S. 1132 (1998). Likewise, other circuits have refused to engage in *post hoc* efforts to "harmonize[]" inconsistent decisions by raising distinctions not "emphasized (or even mentioned)" by state courts. *Gosier v. Welborn*, 175 F.3d 504, 507 (7th Cir.), *cert. denied*, 528 U.S. 1006 (1999).

3. In concluding that the alleged default rule was adequate, the Eleventh Circuit even relied on several state decisions decided *after* the alleged default. *See supra* at 14; App.12a-13a. But that approach directly conflicts with decisions of other circuits holding that "[t]he relevant inquiry is whether the rule was well-established or consistently applied 'at the time of [the] alleged default.'" *Scott*, 567 F.3d at 581 n.7; *accord Walker v. Attorney Gen. of U.S.*, 167 F.3d 1339, 1344-45 (10th Cir.), *cert. denied*, 528 U.S. 987 (1999); *see also Fautenberry v. Mitchell*, 515 F.3d 614, 641 (6th Cir.),

cert. denied, 129 S. Ct. 412 (2008). A petitioner cannot have notice of an interpretation issued after the fact.

4. The multi-dimensional conflicts created by the divided decision below exacerbate the conflict and confusion that already pervades the adequacy inquiry. *See, e.g.*, Recent Case, *Federal Courts—Habeas Corpus—Fourth Circuit Fails To Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine.—McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007)*, 120 Harv. L. Rev. 2246, 2246 (2007) (noting existing "confusion as to when a state procedural default is an adequate state ground to preclude federal habeas review"); *cf. Beard*, 130 S. Ct. at 620 (Kennedy, J., joined by Thomas, J., concurring) (observing that the level of specificity or consistency that an evolving body of state law must provide in order to establish an adequate default rule "should be addressed"). This case provides an ideal vehicle to resolve these conflicts of authority and provide needed guidance in this important area.

C. The Grant Of Certiorari In *Walker v. Martin* Heightens The Need For Review Here

The Court's grant of certiorari in *Walker v. Martin*, No. 09-996, indicates that this Court already appreciates the need for guidance in this area. Granting certiorari in this case—in complement to *Walker*—would provide the Court with the best opportunity to consider the full dimensions of the problems currently vexing the lower courts in conducting the adequacy inquiry and to provide the needed guidance. The grant in *Walker* thus only bolsters the importance of plenary review in this case.

In *Walker*, the Ninth Circuit reversed the district court's determination that California's case-made

timeliness rule—which calls for inmates to file habeas claims without "substantial delay"—was adequate and thus precluded federal habeas review of claims filed in state court *five years* after a case became final on direct review. The Ninth Circuit held that the state courts had not "firmly defined" the timeliness rule and that the State had not met its burden in showing that the rule was "consistently applied." *Martin v. Walker*, 357 F. App'x 793, 794 (9th Cir. 2010), *cert. granted*, No. 09-996, 2010 WL 621406 (U.S. June 21, 2010).

In its petition for certiorari, the State—which repeatedly touted "the need to further clarify the rules relating to the 'adequacy' of state procedural bars"—sought to portray the Ninth Circuit's decision as the poster child for what is *wrong* with the adequacy doctrine. Pet. at 6, *Walker*, No. 09-996 (Feb. 17, 2010). In addition, the State argued that its rule had a discretionary component and that the Ninth Circuit had improperly nullified that rule. *Id.* at 13-14, 16. The State's amicus—which likewise observed that "[t]his Court's jurisprudence of 'adequate state grounds' has been plagued by imprecise language"—went further and argued that this Court should "consider whether to scrap the 'adequacy' inquiry in habeas altogether." Br. Amicus Curiae of the Criminal Justice Legal Foundation in Support of Pet. for Writ of Certiorari (CJLF Br.) at 9, 15, *Walker*, No. 09-996 (Mar. 24, 2010).

While they both involve application of the adequacy inquiry, there are important differences between this case and *Walker*. For example, *Walker* concerns the adequacy of a judge-made rule that is overtly discretionary. This case involves a written state procedural rule that is not discretionary in the relevant sense, and that was applied by state courts in a manner

favorable to defendants before the relevant period. (Of course there is some discretion associated with determining whether a prisoner was without fault, but the State does not deny that Maples was without fault here.) Even if States should be allowed to have rules that are clear but discretionary, this Court's precedents recognize that federal review of alleged constitutional violations should not be foreclosed on the basis of state rules—like the one at issue here—that are purportedly objective but capriciously applied.

Likewise, whereas the Ninth Circuit based its inadequacy finding largely on the state courts' failure to *define* the default rule, this case involves the adequacy of a procedural rule that on its face appears to authorize an untimely appeal when the inmate is not at fault and has been interpreted by courts to allow untimely appeals in analogous circumstances. In that respect, this case also raises the concern that even the amicus in *Walker* seemed to recognize would be an appropriate ground for refusing to enforce a state rule: when doing so would amount to a "procedural trap" for the unwary. CJLF Br. 8. And of course, whereas the inmate in *Walker* waited five years to file his state habeas petition, the inmate here sought relief as soon as he learned of the denial of his petition.

If *Walker*, to some, illustrates how federal courts can apply the adequacy inquiry in a way that unduly *intrudes* on the sovereignty of the States, then this case underscores why the doctrine is needed to ensure that inmates are not arbitrarily deprived of federal habeas review of constitutional claims. This case therefore would be an ideal companion to *Walker*. And granting review in this case, as well as *Walker*, would thus permit the Court more fully to consider the range

of issues currently surrounding the adequacy inquiry and to ensure that the Court fully accounts for the legitimate uses of the doctrine in federal habeas.

II. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT MAPLES FAILED TO SHOW CAUSE WARRANTS REVIEW

Even when a state default rule is adequate, the federal courts may excuse a default where the prisoner had "cause" for not following the state procedural rule and suffered prejudice. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *see also House v. Bell*, 547 U.S. 518, 536 (2006). The divided Eleventh Circuit decision's conclusion that Maples failed to establish cause independently warrants review.[4]

A. The Eleventh Circuit's Decision Conflicts With *Jones v. Flowers* And Other Precedents

As the Court has stated, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense" precipitated the default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The divided Eleventh Circuit held that Maples failed to establish cause only "because there is no right to post-conviction counsel." App.17a. In focusing solely on whether the actions of Maples's *attorneys* constituted cause, the Eleventh Circuit departed from this Court's cases by failing to consider whether there were other external factors precipitating the alleged default—

---

[4] Because the Eleventh Circuit held that Maples did not establish cause, it did not consider prejudice. Given the grave consequences of any default, however, prejudice is undeniable. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000).

including the State's own failure to provide constitutionally adequate notice.[5]

In *Jones v. Flowers*, 547 U.S. 220 (2006), this Court considered the due process requirements when a State mails notice to an individual concerning a deprivation of property in connection with a tax forfeiture and the notice is returned unclaimed. The Court, in a decision by the Chief Justice, held that "[w]e do not think that a person who actually desired to inform [a recipient] would do nothing when a certified letter sent to the [recipient] is returned unclaimed." *Id.* at 229. As the Court explained, when receiving an unclaimed letter, it is not enough for the State just to "shrug [its] shoulders ... and say 'I tried.'" *Id.* Rather, given the interests at stake—in *Jones*, "such an important and irreversible prospect as the loss of a house," *id.* at 230—the State must try again through a different means. To say the least, due process requires no less when it comes to the "important and irreversible prospect," *id.*, of extinguishing a *life*.

---

[5] Although respondent conceded below that this argument was raised in Maples's opening brief, respondent argued that it was somehow waived at oral argument. Resp. Mot. To Review Oral Argument Record and/or Transcript at 2. That is incorrect. Maples's counsel observed during oral argument that he was not trying to shift the blame to the State, but in a case where there is plenty of blame to go around (except to petitioner, who all agree was blameless) that hardly amounts to a renunciation of the argument that the State's own conduct must be taken into account in determining whether cause exists. Moreover, because this argument is included within petitioner's overarching position that he demonstrated cause for any default, this Court undeniably has the authority to address it. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). And there are compelling reasons for the Court to do so.

Here, as in *Jones*, the State received copies of the unopened orders sent to both *pro bono* attorneys and the envelopes plainly indicated that they were not delivered and that an attorney had left the firm. App.34a-35a, 223a, 227a. Yet, as in *Jones*, upon receiving the unopened and unclaimed envelopes individually addressed to Maples's *pro bono* attorneys of record, the state court clerk did "nothing." *Jones*, 547 U.S. at 234. It follows *a fortiori* from *Jones* that—wholly apart from the failures of Maples's counsel—the State's failure to take further action to provide Maples with notice was constitutionally inadequate. As in *Jones*, the state clerk's "[f]ailure to follow up [was] unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229.

This due process violation was not excused by the fact that the clerk sent notice to Maples's local counsel. The State is well aware that out-of-state counsel typically serve as the primary—if not sole—counsel to Alabama's substantial death row population. The State recently advised this Court that 75% of Alabama's death row inmates are represented during post-conviction proceedings by "out-of-state law firms and/or public interest groups." Br. in Opp. at 11, *Barbour v. Allen*, No 06-10605 (May 10, 2007) (citation omitted), *cert. denied*, 551 U.S. 1134 (2007). Alabama has acknowledged that it has affirmatively chosen "to rely on the efforts of typically well-funded out-of-town volunteers" to provide post-conviction representation to the State's death row inmates. *Id.* at 23.

Furthermore, due process "require[s] the government to consider unique information about an intended recipient regardless of whether a statutory

scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230. The Eleventh Circuit decided this case on the premise that Maples's *pro bono* counsel were "attorneys of record and had performed all of the substantive work on Maples's Rule 32 case." App.3a. When the State learned that its attempt to notify those attorneys had failed, the state court clerk was obligated to do *something*—such as attempting to contact the pro bono attorneys or their former law firm through other means, or reaching out to local counsel or even Maples himself. The State certainly had no difficulty contacting Maples directly once the appeal period ran. Its failure to do so earlier deprived petitioner of due process and establishes cause to excuse any procedural default.

B. The Eleventh Circuit's Decision Goes Well Beyond The Reach Of *Coleman v. Thompson*

Even assuming that the State's own conduct failed to establish cause under this Court's precedents, the Eleventh Circuit erred in holding that this Court's decision in *Coleman v. Thompson* categorically bars a finding of cause. App.17a. *Coleman* rests on agency principles that are inapplicable when an attorney is not functioning as his client's agent, as other courts have recognized and members of this Court recently confirmed in *Holland v. Florida*, No. 09-5327, 2010 WL 2346549, at *18 (U.S. June 14, 2010).

Coleman held that, during postconviction proceedings when the Sixth Amendment right to counsel does not attach, "[a]ttorney *ignorance* or *inadvertence* is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" 501 U.S. at 753

(emphasis added) (citation omitted). As the Court explained, this principle is rooted in "well-settled principles of agency law" attributing the negligence of an agent to his principal. *Id.* at 754; *see Holland*, 2010 WL 2346549, at *20 n.4 (Scalia, J., dissenting) ("*Coleman* ... merely applied, the already established principle that an attorney's acts are his clients.").

It is equally well-settled, however, that a client is not constructively responsible for an agent's misconduct after the agency relationship has ended, or after the supposed agent has committed a serious breach of loyalty. *See* Restatement (Second) of Agency ch. 5 scope note (1958); *id.* § 112; Restatement (Third) of Agency § 5.04 (2006). Thus, the rule of *Coleman* by its own terms does not extend to such situations.

In the context of equitable tolling in federal habeas, this Court has held that a missed deadline may be forgiven if "some extraordinary circumstance stood in [the petitioner's] way," *Holland*, 2010 WL 2346549, at *1 (citation omitted), but has explained that a client is generally responsible for garden-variety negligence by his attorney, *see id.*; *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (citing *Coleman*). As Justice Alito recently explained in *Holland*, however, those principles do not apply if the petitioner's "attorney essentially 'abandoned' him." 2010 WL 2346549, at *18 (Alito, J., concurring in part and concurring in the judgment). "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.*

Although the procedural default doctrine implicates considerations of federalism and comity not present in *Holland*, there is no basis to extend *Coleman* to

attorney malfeasance that falls outside of the agency relationship. Indeed, even the dissenters in *Holland* agreed with the principle that attorney error would not be attributable to petitioner (under *Coleman* or *Lawrence*) if the circumstances "ended the agency relationship before the relevant window." *Id.* at *22 n.9 (Scalia, J., joined by Thomas, J., in relevant part, dissenting). And in his concurring opinion, Justice Alito emphasized that attorney abandonment is fundamentally different. *Id.* at *18. At the time of the events at issue, Maples's *pro bono* attorneys of record had left Sullivan & Cromwell without providing notice to the Alabama trial court or substituting counsel, and thus were no longer functioning as his agent.[6]

Federal and state courts have recognized that a procedural default precipitated by a petitioner's "utter abandonment" by his attorneys would "constitute[] extraordinary circumstances *external* to the party's own conduct" and thus constitute cause. *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc) (citation omitted), *cert. denied*, 541 U.S. 905 (2004); *see also Baldayaque v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'") (citation omitted); *Manning v. Foster*, 224

---

[6] As the Eleventh Circuit stated, "arrangements had been made within the firm for other attorneys at Sullivan & Cromwell to take over representation of Maples," but "none of Maples's attorneys filed anything with the Alabama trial court reflecting this change." App.4a; *see also* App.257a-58a. And local counsel's only involvement was to admit Ingen-Housz and Munanka. App.257a. So Maples was left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned.

F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to client when attorney "does not actually represent the client"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992) (acknowledging that attorney's alleged conflict-of-interest would be "external" cause for default because attorney would have "effectively ceased to be [the client's] agent"). The Eleventh Circuit's holding that Maples failed to show cause is inconsistent with those decisions.

It is also inconsistent with the decisions of numerous state courts holding that due process entitles a habeas petitioner to an out-of-time filing when a missed deadline is due to the abandonment of counsel. *See Puckett v. State*, 834 So. 2d 676, 681 (Miss. 2002) ("[W]e do not base [equitable relief] on mere excusable neglect or ignorance by Puckett or his counsel, but upon our recognition that the actions of former counsel were such as to rise to the deprivation of fundamental due process."); *Williams v. State*, 44 S.W.3d 464, 469 (Tenn. 2001) ("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing certain remedies independently."). Similarly, the Arkansas Supreme Court found "cause" to excuse a petitioner's procedural default after his attorney ceased representation but "had not taken any formal steps to withdraw as the attorney of record." *Porter v. State*, 2 S.W.3d 73, 74 (Ark. 1999). As the *Porter* court recognized, it is fundamentally unfair "to require an inmate on death row to abide by the stringent filing deadlines when he was under the [false] impression he was represented by counsel." *Id.* at 75.

Worse yet, the Eleventh Circuit's decision has widened an entrenched circuit split on whether the

Due Process Clause permits a litigant in a civil proceeding (in which no Sixth Amendment right to counsel attaches) to be held responsible for attorney misconduct that renders a proceeding fundamentally unfair. Several circuits have concluded that counsel's performance in a deportation proceeding may be "'so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.'" *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992) (citation omitted); *see also Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga v. Attorney Gen. of U.S.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko v. INS*, 351 F.3d 717, 723-24 (6th Cir. 2003); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003). Two other circuits have held the opposite. *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). Although this case does not involve a deportation proceeding, the same due process principles apply to post-conviction proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985).

As the dissent explained (App.31a), the Eleventh Circuit's decision also conflicts with the decisions of this Court emphasizing that "[h]abeas corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 128 S. Ct. 2207, 2200 (2008) (citation omitted); *see also Holland*, 2010 WL 2346549, at *11. As the dissent stated, denying an indigent death-row prisoner access to federal courts with respect to serious ineffective assistance counsel claims because of a missed deadline that all agree was not his fault is "'fundamentally unjust'" and incompatible with the "equitable principles" on which habeas corpus is grounded, if not the Constitution itself. App.32a (citation omitted); *see*

App.31a n.4. Those principles bolster the logical conclusion that *Coleman* does not control here.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The questions presented here are vitally important and frequently recurring. One study commissioned by the Department of Justice concluded that asserted procedural defaults were invoked to bar claims in some 42% of capital habeas cases brought by state prisoners. *See* Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 48 (2007). The significance of that statistic is underscored by the fact that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). But of course, a state prisoner cannot secure any relief in federal court if his claim is barred by the procedural default doctrine.

As this Court has emphasized, important state interests are served when States enforce well-established procedural rules against petitioners who cannot show cause for their noncompliance. *See, e.g.*, *Carrier*, 477 U.S. at 494-95. But a regime in which *ad hoc* rules reconcilable only through *post hoc* ingenuity are permitted to bar access to federal court, or an individual may be put to death without any federal review of serious constitutional claims for reasons that all concede were not his fault, may call into question the legitimacy of a system of capital punishment itself and "transgress[] the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

These risks are particularly acute here where—unique among all other states—Alabama does not provide *any* right to post-conviction counsel at the post-conviction stage. *See* Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1081 (2003). Alabama understands that its capital prisoners are routinely forced to rely on the assistance of "'out-of-state law firms and/or public interest groups.'" Br. in Opp. at 11, *Barbour*, No. 06-10605 (May 10, 2007) (citation omitted). Under the decision below, however, even those prisoners who secure counsel may be subjected to insuperable and unforeseen procedural barriers that will further diminish meaningful access to federal court. Moreover, when a prisoner runs afoul of such barriers for reasons that all agree are not his fault, he will have no recourse—even if the State itself is involved in the alleged default. The potential for these rulings to work manifest injustice is clear and warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

July 9, 2010

OPPOSITION BRIEF

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

RICHARD F. ALLEN,
Commissioner, Alabama Dept. of Corrections,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for
the Eleventh Circuit

BRIEF IN OPPOSITION

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130
(334) 242-7300
cmaze@ago.state.al.us

August 20, 2010

(Capital Case)

QUESTIONS PRESENTED

Cory Maples failed to appeal the dismissal of his state post-conviction petition within 42 days, as mandated by Alabama law. As a result, Maples failed to exhaust his post-conviction remedies in the state appellate courts.

Both the district court and the court of appeals held that Maples' failure to exhaust constituted a procedural default of his post-conviction claims during federal habeas review. The questions presented are:

1. Is Alabama's 42-day time limit for filing a notice of appeal an independent and adequate state procedural rule that warrants procedural default during federal habeas review?

2. To excuse his procedural default, can Maples establish that his failure to appeal the denial of his state post-conviction petition was "caused" by either the state circuit clerk or his "abandonment" by post-conviction counsel when Maples raised neither of these arguments below?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Murders of Stacy Terry and Barry Robinson 4

B. Maples' Trial and Direct Appeal 4

C. State Post-Conviction Proceedings 5

D. Federal Habeas Proceedings 9

REASONS FOR DENYING THE PETITION 15

I. Maples' Claim That Alabama's 42-Day Filing Deadline Is Not An "Independent And Adequate" Procedural Rule Is Not Worthy Of Review. 16

A. Alabama's 42-Day Filing Deadline Was Firmly Established And Regularly Followed In 2003 17

B. If Alabama's 42-Day Filing Deadline Is An "Inadequate" Procedural Rule, Then So Is This Court's 90-Day Filing Deadline. 24

C. No Split Of Authority Warrants This Court's Review. 27

D. The Grant Of Certiorari Review In *Walker v. Martin* Has No Bearing On The Outcome Of This Case. 28

II. Maples Failed To Raise Either Of His "Cause And Prejudice" Arguments Below 29

A. Maples Affirmatively Disavowed The Argument That The State Circuit Clerk "Caused" His Failure To Appeal. 30

B. Maples Failed To Argue Below That Attorney Abandonment "Caused" His Failure To Appeal. 33

III. Even If The Court Grants The Writ, Maples' Ineffective Assistance of Counsel Claims May Still Be Procedurally Defaulted. 37

CONCLUSION 41

APPENDIX

Motion to Review Oral Argument Recording And/Or Transcript 1a

Order Dated Jan. 25, 2010 ..... 8a

Order Dated Feb. 9, 2010 ..... 10a

TABLE OF AUTHORITIES

CASES

Barbour v. Allen, No. 06-10605.....16

Beard v. Kindler, 130 S.Ct. 612 (2009).....*passim*

Bowles v. Russell, 551 U.S. 205 (2007).....1, 25

Brooks v. State, 892 So. 2d 969 (Ala. Crim. App. 2002) 21

Coleman v. Thompson, 501 U.S. 722 (1991)...2, 16, 33

Davis v. State, 644 So. 2d 44 (Ala. Crim. App. 1994) 18

Dugger v. Adams, 489 U.S. 401 (1989).....20, 21

Durham v. United States, 401 U.S. 481 (1971).....26

Edwards v. Carpenter, 529 U.S. 446 15

Ex parte Johnson, 806 So. 2d 1195 (Ala. 2001).....21

Ex parte Maples, 758 So. 2d 81 (Ala. 1999).....5

Ex parte Miles, 841 So. 2d 242 (Ala. 2002).....21

Fountain v. State, 842 So.2d 719 (Ala. Crim. App. 2002) 21

Freeland & Kronz, 503 U.S. at 646.....31, 35

Hallford v. Culliver, 379 F.Supp.2d 1232 (M.D. Ala. 2004) 37

Hayden v. Harris, 437 So.2d 1283 (Ala. 1983) 17

Jenkins v. Bullard, 210 Fed. Appx. 895 (11th Cir. Dec. 13, 2006) 39

Jenkins v. State, 12 So. 3d 166 (Ala. Crim. App. 2008) 21

Loggins v. State, 910 So. 2d 146 (Ala. Crim. App. 2005) 17

Maples v. Alabama, 531 U.S. 30 (2000).....5

Maples v. Allen, No. 07-15187 (11th Cir.) 11

Maples v. State, 758 So. 2d 1 (Ala. Crim. App. 1999) 5

Marshall v. State, 884 So. 2d 898 (Ala. Crim. App. 2002) .....*passim*

Martin v. Walker, 357 Fed. Appx. 793 (9th Cir. Nov. 20, 2009).....28

Martinez v. State, 602 So.2d 504 (Ala. Cr. App. 1992) 18

Holland v. Florida, 130 S.Ct. 2549 (2010) 39

Northwest Airlines, Inc. v. Spirit Airlines, No. 06M7 39

Reed v. Jones, No. CIV. A. 970563RVL, 2000 WL 1848148 (S.D. Ala. Dec. 4, 2000) 38

Robinson v. State, 865 So. 2d 1250 (Ala. Crim. App. 2003) 21

Schacht v. United States, 398 U.S. 58 (1970).....26

Shephard v. State, 598 So.2d 39 (Ala. Crim. App. 1992) 18

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).....31

Thompson v. State, 860 So. 2d 907 (Ala. Crim. App. 2002) 21

Turner v. State, 365 So.2d 335 (Ala. Crim. App. 1978) 18

Walker v. Martin, No. 09-996.....28, 29

Williams v. Ferrell, No. 07-0617-WS-M, 2008 WL 725105 (S.D. Ala. Mar. 17, 2008).....38

Woods v. State, 371 So.2d 944 (Ala. 1979).....18

STATUTES

Code of Alabama
§13A-5-40(a)(2) 5
§13A-5-40(a)(10) 5

United States Code
28 U.S.C. §2254 9

RULES

Federal Rules of Evidence
Rule 201 22

Eleventh Circuit Rule
Rule 34-4(g) 13

Alabama Rules of Appellate Procedure
Rule 2(a) ..... *passim*
Rule 4(a) ..... *passim*

Alabama Rules of Criminal Procedure
Rule 32.1(f) 19
Rule 32.6(b) 37, 38
Rule 34.4 ..... 6, 9, 21, 32

Alabama Rules for Admission to the Bar
Rule VII(A), ... 6
Rule VII(C), ... 6, 35

OTHER AUTHORITIES

Alabama Unified Judicial System, *FY 2009 Annual Report*, p.12 (http://www.alacourt.gov/Annual%20Reports/2009AOCAnnualReport.pdf) 18

E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* (9th ed. 2007) 26, 39

INTRODUCTION

Every state and federal appellate court limits the amount of time for filing a notice of appeal or petition for a writ of certiorari. Nearly every day, a party forfeits his appeal by missing one of these deadlines.

Petitioner Cory Maples says that it is a "shocking prospect" that the failure of a death row inmate to meet a filing deadline forfeits further review of the inmate's claims, Pet. 10, and "the fact that a man may be executed in these circumstances ought to be enough to merit this Court's review." Pet. 11. But filing deadlines apply to death row inmates. For example, this Court rejected Ryan Heath Dickson's certiorari petition as untimely because he missed the Court's 90-day filing deadline by one day. *See Bowles v. Russell*, 551 U.S. 205, 212 n.4 (2007). Four months later, Dickson was executed "without any Member of this Court having ever seen his petition for certiorari," much less having reviewed its merits. *Id.*

Alabama similarly applies its 42-day deadline for filing notices of appeal. Ala. R. App. P. 4(a)(1). Maples was represented in state post-conviction proceedings by local counsel and a team of attorneys from a multi-million-dollar law firm, Sullivan & Cromwell. A series of errors lead to Maples missing the 42-day filing deadline: (1) The attorneys of record from Sullivan & Cromwell left the firm but failed to notify the state court; (2) the firm assigned new attorneys to Maples' case, who likewise failed to notify the state court; and, apparently, (3) no one

notified the firm's mailroom of the switch. As a result, when the state circuit clerk mailed copies of the court's order dismissing Maples' petition to Maples' attorneys of record, the Alabama attorney took no action, believing that Sullivan & Cromwell attorneys would file the notice of appeal, and Sullivan & Cromwell returned its copies of the order, unopened.

Alabama codifies the consequence of failing to meet the 42-day filing deadline: "An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court." Ala. R. App. P. 2(a). Maples failed to exhaust his post-conviction claims in state court by failing "to invoke the jurisdiction of the appellate court[s]." *Id.* Applying this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), both the district court and court of appeals held that (a) each of Maples' claims that arose during the state post-conviction proceedings is procedurally defaulted from habeas review for failure to exhaust in state court and (b) the errors of post-conviction counsel cannot excuse the default. The courts were correct, and certiorari review is unwarranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Maples correctly cites the relevant Constitutional and statutory provisions, Pet. App. 242a-252a, except that he omits the state procedural rule that bars any attempt to exhaust Maples' post-conviction claims in Alabama's appellate courts:

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 2. PENALTIES FOR NON-COMPLIANCE WITH THESE RULES; SUSPENSION OF RULES

(a) Dismissal of Appeal

(1) An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.

STATEMENT OF THE CASE

Both questions presented require fact-intensive inquiries. Accordingly, the State details the history of this case at length. We do so with an eye toward three facts that not only drive the questions presented, but we believe are not fully and fairly fleshed out in Maples' petition:

- The factual distinction between Maples' post-conviction representation and the representation of the petitioner in *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002) (Question #1, Pet. 13-17);

- Maples' decision below *not* to argue that the state circuit clerk was the "cause" of his failure to appeal (Question #2, Pet. 24-27);

- Maples' continuous representation by Sullivan & Cromwell attorneys, and Maples' failure to argue below that his attorneys abandoned him (Question #2, Pet. 27-33).

A. The Murders of Stacy Terry and Barry Robinson

Maples spent the evening of July 7, 1995, "drinking, playing pool, and riding around" with Stacy Terry, a high school acquaintance. Pet. App. 36a-37a. When the duo left the pool hall later that evening, they agreed to give another acquaintance, Barry Robinson III, a ride home. Pet. App. 37a.

Their first stop was Maples' house. Upon arriving, Maples got out of Mr. Terry's car and went into his home, where he retrieved his father's .22 caliber rifle. *Id.* When he returned, Maples walked to the driver's side of the car and shot Mr. Terry twice in the head before shooting Mr. Robinson twice in the head, killing both instantly. *Id.* Maples removed Mr. Terry from the driver's seat and fled in his car.

Shortly after the murders, Maples' half-brother discovered Mr. Terry's body sprawled on the driveway. *Id.* Police found Mr. Robinson's body in a nearby creek 20 hours later. *Id.* Nearly a full month passed before police located Maples in a Nashville, Tennessee hotel. Pet. App. 38a. The day after his apprehension, Maples confessed to both murders. *Id.*

B. Maples' Trial and Direct Appeal

Maples was tried and convicted of intentional murder during a robbery and the intentional murder of two or more persons, both capital offenses under Alabama law. *See* Ala. Code §§13A-5-40(a)(2),

-40(a)(10). Following the jury's recommendation, the state trial court sentenced Maples to death.[1]

Both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Maples' conviction and death sentence on direct appeal. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999); *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. 1999). This Court denied certiorari review. *Maples v. Alabama*, 531 U.S. 30 (2000).

C. State Post-Conviction Proceedings

1. *The Rule 32 Petition*: Maples filed a post-conviction "Rule 32" petition with the state circuit court on August 1, 2001, which he later amended. Doc. #30, Tabs 47, 49. In his petition, Maples raised several claims of ineffective assistance of trial counsel.

Maples' Rule 32 petition was filed by Clara Inga-Housz and Jaasi Munaka, both attorneys with the New York office of Sullivan & Cromwell, and by local counsel, John G. Butler, Jr. Pet. App. 222a.

---

[1] The State does not detail Maples' trial strategy because Maples' ineffective assistance of counsel claims are procedurally defaulted. But we do note the glaring factual omission in Maples' contention that trial counsel were ineffective for failing to prove that Maples was intoxicated when he committed the murders. Pet. 3-4. Maples' attorneys argued that Maples was *not* intoxicated at the time of the murder, and presented three witnesses to back up their assertion, because they were faced with Maples' signed confession that, despite having several beers by 8:00pm, he "didn't feel very drunk" when he murdered Mr. Terry and Mr. Robinson several hours later. Pet. App. 2a; Doc. #30, Tab 2 at 207-210, 2739, 2749, 2757, 2761.

Attorneys Inga-Housz and Munaka were granted *pro hac vice* status pursuant to Rule VII(A) of the Alabama Rules of Admission to the Bar. Pet. App. 223a. Attorney Butler served as Sullivan & Cromwell's local sponsor pursuant Rule VII(C), which bestowed upon him "joint and several responsibility with the foreign attorney[s]."

The state circuit court entered a written order denying Maples' Rule 32 petition on May 22, 2003. Pet. App. 222a; Doc. #30, Tab 66. Pursuant to Rule 34.4 of the Alabama Rules of Criminal Procedure, the circuit clerk promptly mailed a copy of the court's order to "all of the attorneys of record at the addresses provided by each attorney." Pet. App. 222a. "Included on that list were attorneys Clara Inga-Housz and Jaasi Munaka [address omitted], as well as local counsel John G. Butler." Pet. App. 222a-223a. Pursuant to the same state rule, the clerk did not mail a fourth copy to Maples in prison. *See* Ala. R. Crim. P. 34.4 (requiring service on both a represented defendant/petitioner and his attorney(s) to announce "hearings at which the defendant's presence is required" and only on counsel "[a]s to all other notices or documents").

2. *The Failure to Appeal*: Maples had 42 days to file a notice of appeal with the circuit clerk. Ala. R. App. P. 4(a)(1). The failure to meet that July 7, 2003 deadline subjected Maples' case to mandatory dismissal. Ala. R. App. P. 2(a) ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court"). But when July 7th came, Maples' notice of appeal did not.

Another month passed. Maples filed nothing. Recognizing that Maples' September 9, 2003 deadline for filing his federal habeas petition was approaching, and that Maples still had the ability to seek habeas review of his fully-exhausted claims from direct appeal, the State's attorney took action. On August 13, 2003, Assistant Attorney General Jon Hayden wrote Maples a letter, informing Maples of the upcoming deadline for filing a federal habeas petition and providing him with the name and address of the district court clerk with whom the petition should be filed. Pet. App. 253a-254a.

Upon receiving the letter, Maples contacted his mother, who in turn contacted Sullivan & Cromwell. Pet. App. 258a. Maples, through different Sullivan & Cromwell attorneys, moved the state circuit court to vacate its May 23rd dismissal order and replace it with a new dismissal order, thereby resetting the 42-day window to appeal. Pet. App. 223a. Maples attached two affidavits to the motion. In the first, local counsel Butler admitted that he received his copy of the May 23rd dismissal order but took no action because he believed the Sullivan & Cromwell attorneys would. Pet. App. 255a-256a. In the second, Marc De Leeuw, a Sullivan & Cromwell attorney, averred that (1) Attorneys Ingen-Housz and Munanka left the firm in 2002; (2) since their departure, "other lawyers at S&C have worked on this case;" and, (3) the copies of the final order sent to Attorneys Ingen-Housz and Munanka "had been returned to the clerk's office." Pet. App. 257a-258a.

The circuit court denied Maples' request to vacate its original order and issue a substitute, stating that "[t]his Court is unwilling to enter into subterfuge in order to gloss over mistakes by counsel." Pet. App. 224a. The court found that the circuit clerk properly served all three of Maples' attorneys of record at their listed addresses, with local counsel receiving his copy and both foreign counsel returning their copy, unopened, marked "Return to Sender." Pet. App. 222a-223a. The court further found that, despite the departure of Maples' original attorneys from Sullivan & Cromwell, and the firm's assignment of new attorneys to Maples' case, no one notified the court or its clerk of the switch. Pet. App. 223a.

3. *The Mandamus Proceeding*: Alabama's 42-day filing deadline speaks in mandatory and jurisdictional terms. *See* Ala. R. App. P. 4(a)(1) ("the notice of appeal shall be filed with the clerk of the trial court within 42 days"); Ala. R. App. P. 2(a) ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court."). Yet, the Alabama courts have granted criminal appellants with an out-of-time appeal in the limited instances in which the defendant/petitioner's constitutional rights were implicated. Pet. App. 13a (outlining the "three limited circumstances").

Still represented by Sullivan & Cromwell attorneys, Maples filed a mandamus petition with the Alabama Court of Criminal Appeals seeking an out-of-time appeal. Doc. #30, Tab. 51. Maples relied on the same court's granting of an out-of-time appeal

in *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002), rev'd on other grounds, 884 So. 2d 900 (Ala. 2003)—the same case upon which Maples bases Question One here, *see* Pet. 13-17—to argue that an out-of-time appeal is due when a Rule 32 petitioner fails to personally receive a copy of the court's dismissal order. Pet. App. 231a.

The appellate court denied Maples' petition. The court noted that (1) unlike Maples, the petitioner in Marshall "was proceeding *pro se*" and (2) Alabama courts had granted out-of-time appeals only "when there was evidence indicating that the circuit clerk failed to mail notification that the Rule 32 petition had been denied," which amounted to a violation of "procedural due process." Pet. App. 232a. The court held that Maples "failed to show that his right to procedural due process was violated" because Criminal Rule 34.4 mandated service on Maples' attorneys (not Maples) and the circuit clerk had mailed a copy of the final order to all three of Maples' attorneys of record. Pet. App. 234a-236a.

Both the Alabama Supreme Court and this Court denied review without opinion. Doc. #30, Tabs 68, 69.

D. Federal Habeas Proceedings

1. *District Court*: Maples timely filed a federal habeas petition pursuant to 28 U.S.C. §2254. Doc. #1. Maples was represented by the same Sullivan & Cromwell attorneys who led his attempts to garner an out-of-time appeal in state court. In their September 12, 2003 motions for admission *pro hac*

vice, each of Maples' Sullivan & Cromwell attorneys swore that he or she had been working on Maples' case since before the state circuit court issued its dismissal order. Docs. #2 at 1, #3 at 1, #4 at 1.

In his petition, Maples raised claims that arose both on direct appeal and during his post-conviction proceedings. With regard to Maples' ineffective assistance of counsel ("IAC") claims, which arose during Maples' state post-conviction proceedings, the State argued that the claims were procedurally defaulted for alternative reasons: (1) Maples' failure to sufficiently plead the claims in the state circuit court and (2) Maples' failure to exhaust the claims on appeal. Doc. #29 at 23.

The district court denied Maples' petition. The court rejected 27 claims arising from Maples' direct appeal on the merits. Pet. App. 56a-202a. The district court held that Maples' IAC claims were procedurally defaulted due to Maples' failure to appeal the dismissal of his Rule 32 petition. Pet. App. 48a-55a. With regard to the "firmly established and regularly followed" question, the district court held that Maples' reliance on "the unique factual circumstances" in *Marshall* was misplaced because "[t]here is no indication that Maples ever submitted *pro-se* pleadings nor did he request that he be informed of the status of his case.[2]" Pet. App. 54a. With regard to "cause and prejudice," the court held

---

[2] In response to Maples' motion to alter the court's judgment, the district court entered a second, "extended parsing of *Marshall*" to establish the "clear factual distinction" between the two cases. Pet. App. 212a-215a.

that "[t]here is no constitutional right to postconviction counsel, and as such, the ineffective assistance of counsel cannot establish the cause and prejudice necessary to overcome Maple's procedural default." Pet. App. 55a.

2. *Circuit Court of Appeals*: Sullivan & Cromwell attorneys continued to represent Maples in the court of appeals. Concerning the "cause" of his failure to appeal in state court, Maples did not argue to the court that his attorneys "abandoned" him in May 2003, as he argues now. *See* Pet. 27-32. Instead, Maples argued in his initial brief that:

> Mr. Maples has established cause by the very fact that he never received a copy of the State's *sua sponte* order dismissing his Rule 32 Petition. [Citations omitted.] Cause exists when a court fails to properly deliver the required documents so that a petitioner may timely affect an appeal.

Maples v. Allen, No. 07-15187 (11th Cir.), Blue Br. 21. In its brief, the State challenged Maples' contention: "In other words, Maples tries to shift blame to the circuit clerk." *Maples*, *supra*, Red Br. 21. Maples clarified his argument in response:

> The State then argues that Mr. Maples cannot establish cause by 'shift[ing] the blame ... to the circuit clerk.' (Appellee Br. at 21-22.) This straw-man argument misses the point. Mr. Maples demonstrated cause because an external objective factor—a mailroom oversight—impeded his efforts to

> comply with a state procedural rule. (Opening Br. at 20-21.) This mailroom clerical error qualifies as an 'exculpatory reason' for not filing a timely appeal from the *sua sponte* dismissal of Mr. Maples' Rule 32 petition.
>
> Mr. Maples is not seeking to 'shift the blame' to the circuit clerk or anyone else. (*See* Opening Br. at 20-21.) Rather, because 'clerical error was to blame,' Mr. Maples has established cause to excuse a procedural default.

Maples, *supra*, Reply Br. 8-9. At oral argument, which we detail further below, Attorney De Leeuw confirmed four times that the "mailroom clerical error" that Maples claimed established cause and prejudice was the failure of the Sullivan & Cromwell mailroom to forward him a copy of the state court's dismissal order. Attorney De Leeuw expressly disavowed making the argument that the circuit court clerk constituted the "cause" of Maples' default.

A divided panel of the court of appeals affirmed, holding that Maples' IAC claims were procedurally defaulted due to Maples' failure to exhaust. The court found that "Alabama's 42-day and out-of-time appeal rules were firmly established by the Alabama courts." Pet. App. 12a. Like the district court and state appellate court, the court of appeals distinguished the *Marshall* case by noting that, unlike Maples who "relied exclusively on his counsel and made no attempt to deal directly with the state trial court or its clerk," Pet. App. 16a,

"Marshall had filed 'numerous *pro se* motions and pleadings'" and "[t]he out-of-time appeal in *Marshall* was granted only because the 'court assumed a duty of notification it did not otherwise owe the petitioner and then failed to perform that duty.'" Pet. App. 14a (quoting *Marshall*, 884 So. 2d at 903).

Regarding "cause and prejudice," the court found that the cause of Maples' failure to exhaust was "counsel's failure to file a timely notice of appeal of the Rule 32 Order."[3] Pet. App. 17a. The court held that post-conviction counsel's failure "cannot establish cause for [Maples'] default because there is no right to post-conviction counsel." Pet. App. 17a.

3. *The Oral Argument Transcript*: Maples replaced his Sullivan & Cromwell attorneys with his present counsel for rehearing. In his rehearing petition, Maples argued that the court of appeals erred by "refus[ing] to recognize" that the "trial court clerk['s]" failure to act upon the receipt of Sullivan & Cromwell's unopened mail "itself constituted cause." Pet. for Rehearing and Rehearing *En Banc* at 10-13.

Having argued the case below, the undersigned called Maples' current counsel to inform him that Maples' former counsel expressly disavowed this claim during oral argument, which by circuit rule is not transcribed for anyone except the court. App. 5a. *See* Eleventh Circuit Rule 34-4(g). The undersigned then moved the court of appeals to suspend Rule 34-4(g) and provide both parties with a transcript because "[i]t is in neither party's interest

---

[3] The dissent agreed that "any such default is entirely the fault of [Maples'] post-conviction counsel." Pet. App. 30a.

to present this Court, or the Supreme Court, with a conceded argument." App. 1a-7a. The court consented, but only upon the condition that each party return the transcript to the court within 60 days, without making a copy. App. 8a-11a. Because the only copy of the transcript resides with the court of appeals, we cannot quote from it. But we can point the Court to the relevant pages:

- *Page 3*: Maples stated that the procedural bar stems from a mail room error in New York.

- *Page 4-5*: Maples stated that the relevant clerical error occurred in New York.

- *Page 6*: Maples stated that the clerical error occurred in a mail room in New York, and that the error was that the mail room should have forwarded the state court's order to Attorney De Leeuw.

- *Page 7*: Maples disavowed the suggestion that he is arguing that the state circuit clerk caused the error. Maples again clarified that the clerical error of which he complained occurred in the New York mailroom and that the error was the failure to forward the envelopes to Attorney De Leeuw.

- *Page 9*: Maples acknowledged that local counsel's failure to act upon receiving the dismissal order was not a clerical error.

The court denied rehearing. Pet. App. 238a-239a.

REASONS FOR DENYING THE PETITION

Countless attorneys have missed filing deadlines over the years, and state and federal courts routinely dismissed their client's tardy appeal as a consequence. This case is no different, and it presents nothing new or nationally compelling.

Maples failed to exhaust his federal claims in state court by failing to meet Alabama's 42-day limit for filing an appeal. The same procedural rule would bar Maples' attempt to return to Alabama's appellate courts. Consequently, Maples' IAC claims are procedurally defaulted from federal habeas review unless he can make one of three showings: (1) Alabama's 42-day filing deadline was not an independent and adequate procedural rule; (2) Maples had good cause for failing to meet the 42-day deadline and was prejudiced by not having done so; or, (3) Maples is actually innocent. *See Edwards v. Carpenter*, 529 U.S. 446, 455 (Breyer, J. concurring). The questions presented fall under the first two exceptions, respectively. Pet. i. Maples does not claim that he is actually innocent.

In Parts I and II, we explain why neither question presents a compelling, nationally-important issue for future petitioners. In Part III, we show that granting the writ would fail to even help Maples because his IAC claims are likely defaulted on alternative grounds.[4]

---

[4] The Amici's collective complaint that Alabama does not employ a public defender service or compensate attorneys who are appointed to represent capital post-conviction petitioners is a red herring. Maples' "default is entirely the fault of his post-

I. MAPLES' CLAIM THAT ALABAMA'S 42-DAY FILING DEADLINE IS NOT AN "INDEPENDENT AND ADEQUATE" PROCEDURAL RULE IS NOT WORTHY OF REVIEW.

Federal habeas courts cannot review a claim that was "rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 130 S.Ct. 612, 614 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Maples does not contend that Alabama's 42-day filing deadline is not "independent" of federal law. *Id.* Maples argues only that the rule was not "adequate" in 2003 because it was not "firmly established and regularly followed"—"FERF" for short. Pet. 12 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). This State-specific, fact-intensive argument is not worthy of the Court's review for two primary reasons: (1) an opinion regarding the adequacy of Alabama's 42-day deadline in 2003 is not nationally important and (2) Maples' FERF argument is incorrect.

---

conviction counsel," Pet. App. 30a (Barkett, J. dissenting), not the system that led to their appointment. As we have previously shown the Court, no inmate currently on Alabama's death row proceeded through his state post-conviction proceedings without an appointed attorney, and 86% of those attorneys either worked for the Equal Justice Initiative (headed by NYU Law professor Bryan Stevenson), out-of-state public interest groups like the Innocence Project, or an out-of-state mega-firm such as Sullivan & Cromwell. *See Barbour v. Allen*, No. 06-10605, State's BIO 5-23.

A. Alabama's 42-Day Filing Deadline Was Firmly Established And Regularly Followed In 2003.

1. *FERF Analysis*: A combination of two rules prevented Maples from appealing the dismissal of his Rule 32 petition after July 7, 2003 and would prevent him from doing so today: Alabama Rules of Appellate Procedure 4(a)(1), which sets the 42-day deadline for filing a notice of appeal, and 2(a), which mandates dismissal for filing outside the 42-day window.[5] Both rules were "firmly established" in 2003 because each took effect on December 1, 1975, and have been published in the Alabama Code ever since. *See* Ala. Code, Vol. 23, Rules of Appellate Procedure 2(a), 4(a) (1975).

The rules were also "regularly followed" in 2003, as shown by numerous published decisions recognizing the dismissal of untimely appeals before 2003. *See, e.g., Hayden v. Harris*, 437 So.2d 1283 (Ala. 1983) (citing five cases for the proposition that "[w]e have consistently held that the failure of an

---

[5] Maples cabins his FERF analysis to Alabama Rule of Criminal Procedure 32.1(f). Pet. 13-19. Criminal Rule 32.1(f), however, merely provides the *vehicle* for criminal defendants/petitioners to request an out-of-time appeal; that is, a second post-conviction petition filed in the circuit court. Furthermore, Rule 32.1(f) did not apply to post-conviction petitioners like Maples until January 2005—more than a year after Maples sought an out-of-time appeal. *See Loggins v. State*, 910 So. 2d 146, 151 n.6 (Ala. Crim. App. 2005). That is why, in 2003, Maples instituted mandamus proceedings in the state appellate court to seek his out-of-time appeal, *see* Pet. App. 11a n.5, and likely why Rule 32.1(f) is not mentioned in the state court's opinion denying Maples' out-of-time appeal. Pet. App. 226a-236a.

appellant to comply with the rules that requiring [sic] notice of appeal be filed within 42 days from the date of entry of final judgment deprives the Court of appellate jurisdiction"); *Woods v. State*, 371 So.2d 944 (Ala. 1979) (dismissing an untimely criminal appeal); *Davis v. State*, 644 So. 2d 44 (Ala. Crim. App. 1994) (same); *Martinez v. State*, 602 So.2d 504 (Ala. Cr. App. 1992) (same); *Shephard v. State*, 598 So.2d 39 (Ala. Crim. App. 1992) (same); *Turner v.* State, 365 So.2d 335 (Ala. Crim. App. 1978) (same). Of course, published cases are the tip of the iceberg. As with any court, Alabama courts do not issue opinions regarding the overwhelming majority of appeals dismissed as untimely. For example, during its 2009 Term, the Alabama Court of Criminal Appeals dismissed 22% of its appellate docket (*i.e.* 398 appeals) prior to submission—a statistic that primarily reflects appeals that were docketed, then dismissed as untimely filed. Alabama Unified Judicial System, *FY 2009 Annual Report*, p.12.[6]

2. *Notice*: The purpose of the FERF requirement is to prevent States from "invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard, supra*, 619 (Kennedy J., concurring). That purpose was met here. Maples' attorneys had notice of the 42-day deadline and the consequence for failing to meet it because, as previously stated,

---

[6] Available at http://www.alacourt.gov/Annual%20Reports/2009AOCAnnualReport.pdf. (Last checked August 12, 2010). The undersigned verified that the category "Dismissed Prior to Submission" reflects cases dismissed as untimely filed with the Clerk of the Court, the Honorable Lane Mann, on July 22, 2010.

Appellate Rules 2(a) and 4(a) had been published in the Alabama Code since 1975.

Maples attempts to have the Court ignore whether he "in good faith complied with existing state procedural law," *id.*, by focusing his notice analysis on the exception, rather than the rule. Maples argues that he "lacked the requisite notice of that rule at the time it was invoked" because "Maples could have reasonably understood Rule 32.1(f) to authorize relief from a missed Rule 32 appeal deadline through no fault of his own—and indeed many then extant Alabama court decisions took that very position at the time of the events at issue." Pet. 13-14. In other words, Maples and his attorneys believed that they could shrug off the State's published and mandatory 42-day deadline because another rule permitted Maples to *request* an out-of-time appeal, as others had successfully done.[7]

We address the "extant Alabama court decisions" mentioned by Maples, Pet. 13-14, in subpart (3). As for the contention that a vehicle to seek an out-of-time appeal destroyed Maples' notice that he was required by Alabama law to file a notice of appeal within 42 days, the State doubts the Court will "seriously entertain the notion," and we therefore address it no further. *Beard*, *supra*, 619-20 (Kennedy, J. concurring) (stating that "no one could seriously entertain the notion" that an escapee acted in "justified reliance" on Pennsylvania's

---

[7] By analogy, Maples would argue that he would lack notice that it is illegal to drive 80 miles per hour on a highway with clearly posted '60mph' speed limit signs if he noticed someone else driving 65mph on the same road without being stopped.

discretionary fugitive forfeiture rule because "[t]here is no justification for an unlawful escape").

3. *Judicial Discretion*: That Alabama courts have discretion to grant an out-of-time appeal does not strip Alabama's 42-day filing deadline of its FERF status. *Beard*, *supra*, 618 ("We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. . . . [A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Nor does the fact that the state courts have exercised that discretion render the rule inadequate. *See id.*; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (concluding that Florida's procedural rule barring post-conviction claims that were not raised on direct appeal was "consistently and regularly" applied because "in the vast majority of cases ... the Florida supreme court has faithfully applied its rule" and the exceptions cited by the petitioner were not "sufficient to undercut the adequacy of the Florida procedural rule").

Maples discusses only one case, *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002), to argue that Alabama courts were not regularly following the 42-day rule in cases like his in 2003. Pet. 15-17. Even if Maples is correct that *Marshall* is factually "indistinguishable" from his case, Pet. 15, a single exception does not render a state's procedural

rule inadequate.[8] *Dugger*, *supra*, 410 n.6.

Regardless, Maples' reliance on *Marshall* is misplaced. Maples' claim that his case and *Marshall* are factually "indistinguishable" is based solely on the characterization of the one-judge *dissent*. Pet. 15 (quoting Pet. App. 30a (Barkett, J. dissenting)). Both lower federal courts and the Alabama Court of Criminal Appeals recognized the same factual distinction between the two cases: In *Marshall*, the petitioner was proceeding *pro se* and the clerk assumed a duty to serve him, but failed to do so. Maples, on the other hand, was relying solely on counsel, and the clerk fulfilled his duty to serve Maples' attorneys as required by Criminal Rule 34.4. Pet App. 13a-16a (Eleventh Circuit), 53a-55a, 212a-215a (district court), 231a-234a (Alabama Court of Criminal Appeals).

---

[8] Maples cites three additional cases, without providing a parenthetical or any discussion: *Jenkins v. State*, 12 So. 3d 166 (Ala. Crim. App. 2008); *Fountain v. State*, 842 So.2d 719 (Ala. Crim. App. 2002); *Thompson v. State*, 860 So. 2d 907 (Ala. Crim. App. 2002). Pet. 15. His amici add four more: *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Robinson v. State*, 865 So. 2d 1250 (Ala. Crim. App. 2003); *Brooks v. State*, 892 So. 2d 969 (Ala. Crim. App. 2002). *See* Amicus Br. of Alabama Appellate Court Justices 7-14; Amicus Br. of ACDLA 3-12. Each case is readily distinguishable. Six of the seven (*Jenkins*, *Fountain*, *Miles*, *Johnson*, *Robinson*, and *Brooks*) involved *pro se* petitioners who were not served a copy of their dismissal orders within 42 days. Only Thompson had counsel, and he was granted an out-of-time appeal because the circuit clerk "rebuk[ed]" Thompson's attempts to appeal, telling Thompson that "if [he] wanted to file anything to the court, [he] would have to file it through counsel," despite the fact that counsel ignored two letters that Thompson wrote during the 42-day filing period regarding an appeal. *Thompson*, *supra*, 908-10.

Maples argues that the facts cited by the courts to distinguish *Marshall* from this case were "taken out of context from a subsequent decision by the Alabama Supreme Court." Pet. 16. But a quick perusal of the state appellate record in *Marshall* proves every court correct. *See Marshall v. State*, CR-01-0204 (on file with counsel and the Alabama Court of Criminal Appeals); Fed. R. Evid. 201(a-b) (permitting judicial notice of "adjudicative facts" that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). The record shows that Marshall filed a handwritten, *pro se* Rule 32 petition in April 1998. While Marshall was appointed an attorney more than a year later, Marshall filed numerous handwritten, *pro se* pleadings both before and after the appointment. Marshall also litigated both his untimely appeal and his quest for an out-of-time appeal *pro se*, typically with handwritten appellate briefs. In other words, Marshall, not an attorney (much less a team of attorneys), litigated his Rule 32 proceedings *pro se* at every level.

As outlined by the Eleventh Circuit, the limited circumstances in which the Alabama courts have granted an out-of-time appeal involved situations where the failure to do so would implicate a defendant/petitioner's constitutional rights. *See* Pet. App. 13a. *Marshall* presented the state court with a procedural due process problem; that is, the circuit clerk assumed a duty to serve Marshall in prison because he was proceeding *pro se*, then failed to do so. Pet. App. 232a. Consequently, Marshall was given an out-of-time appeal. *See also supra* at 21 n.8 (outlining the same distinction between the

cases relied upon by Maples' Amici and this case). Because the clerk in this case had not assumed a duty to personally serve Maples (because Maples was represented throughout by a team of attorneys), this case failed to present a similar constitutional concern. Pet. App. 236a ("Maples has failed to show that his right to procedural due process was violated."). Accordingly, the state court enforced its mandatory filing deadline against Maples. *Id.*

4. *Exorbitant Application*: Maples concludes by arguing that, even if Alabama's 42-day filing deadline was FERF in 2003, the State's actions makes this an "exceptional case in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." Pet. 18 (quoting *Lee*, 534 U.S. at 376). Specifically, Maples complains that "the State had no difficulty notifying Maples immediately *after* the appeal period had lapsed. [Pet.] App. 253a. Its attempt to preclude federal review in these circumstances reflects a 'gotcha' mentality that this Court long ago repudiated." Pet. 19.

Alabama's filing deadlines are published in the Alabama Code and the Alabama Rules of Court. We assume that attorneys will read and follow them. The State has no additional duty to warn opposing counsel of pending deadlines.

Furthermore, Maples' assertion that Assistant AG Hayden's August 13, 2003 letter was a nefarious "attempt to preclude federal review" is plainly wrong. *Id.* Mr. Hayden's letter informed Maples of his federal filing deadline and provided him with the

address to submit his habeas petition. Pet. App. 253a-254a. If anything, that letter *saved* Maples' federal habeas proceedings, which resulted in 27 of Maples' claims being decided on the merits by the district court. Pet. App. 56a-202a. Had the State truly acted with a "gotcha mentality," Pet. 19, we would have waited four more weeks, let Maples' deadline for filing his federal habeas petition pass, and then written Maples to inform him of his execution date.

The Court should reject Maples' call for an extraordinary suspension of the procedural default rule based on the State's action, which is the only reason this case still proceeds seven years later.

B. If Alabama's 42-Day Filing Deadline Is An "Inadequate" Procedural Rule, Then So Is This Court's 90-Day Filing Deadline.

Last Term, the Court recognized the federalism issues that arise from declaring a State's procedural rule to be "inadequate":

> In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.

Beard, 130 S.Ct. at 618 (citations omitted). These Federalism concerns are manifest here, as Maples'

argument against Alabama's 42-day deadline applies with full force to this Court's 90-day deadline for filing petitions for a writ of certiorari.

Maples levies three primary arguments against Alabama's 42-day deadline:

1. Because court decisions, not published rules, decide who gets an out-of-time appeal, "the rule is riddled with *ad hoc* exceptions and evolving,"[9] Pet. 13;

2. Because there are no published rules that determine who gets an out-of-time appeal, "Maples lacked the requisite notice of that rule," Pet. 13; and,

3. The Alabama courts had previously granted an out-of-time appeal to a petitioner who failed to personally receive notice that his petition was denied, Pet. 15-17.

Each of these arguments applies to this Court's Rule 13.1, which provides a 90-day deadline for filing petitions for a writ of certiorari. Like Alabama courts, this Court can exercise its discretion to excuse criminal petitioners who miss the 90-day filing deadline. *See Bowles v. Russell*, 551 U.S. 205, 212 (2007); *Schacht v. United States*, 398 U.S. 58, 64

---

[9] *See also* Pet. 17-18 (chastising the court of appeals' alleged "effort to manufacture a [FERF] default rule by reconceiving the case law 'in retrospect' as 'forming part of a consistent pattern.'" (quoting *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)).

(1970). Like Alabama courts, this Court determines which untimely petitions will be considered on a case-by-case basis. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 389-91 (9th ed. 2007) (citing 11 examples). Finally, like Alabama courts, this Court has allowed an out-of-time petition when the lower court's clerk failed to personally notify the petitioner that his petition was denied, despite assuming a duty to do so. *See Durham v. United States*, 401 U.S. 481, 481-82 (1971).

Our point is not to prove the "inadequacy" of this Court's 90-day rule. Clearly, the Court's 90-day deadline is "firmly established" because the Court has published the rule for more than 20 years, *see* Gressman & Geller, *supra*, 376, and the deadline is "regularly followed" because the Court has denied thousands of untimely petitions, including every late petition between 1982 and 2007. *Id.* at 391.

Our point is that Maples' FERF analysis is flawed, as it would establish that every discretionary rule was inadequate if the jurisdiction exercised its discretion. *But see Beard*, *supra*, 618 ("[A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Furthermore, declaring that Alabama's 42-day deadline is an "inadequate" procedural rule implicates major federalism issues when Alabama applies its 42-day deadline precisely as this federal Court applies its corresponding 90-day deadline.

C. No Split Of Authority Warrants This Court's Review.

We briefly dispel Maples' contention that this case presents three circuit splits that warrant the Court's intervention.

1. *Burden of Proof*: Maples argues that the Eleventh Circuit improperly shifted the burden of proving the adequacy of Alabama's filing deadline from the State to Maples. Pet. 19-20. We disagree. The court of appeals never mentioned the burden of proof in its FERF analysis. Pet. App. 11a-16a. Regardless, the State has met any burden. We have shown that our rule was published in 2003. We have cited numerous cases before 2003 applying the rule. And we have shown that the Alabama courts had not allowed an out-of-time appeal under the unique facts presented here, at least to the extent that it is possible to prove a negative. Therefore, even if there is a lingering question as to which party bears what burden, this is not the case to answer it.

2. *Case-by-case development*: Maples notes that the Ninth Circuit has held that "the fact that a rule is 'subject to a growing number of exceptions' would have compelled the conclusion that it is 'not an adequate state ground to bar federal habeas review.'" Pet. 20 (quoting *Fields v. Calderon*, 125 F.3d 757, 763 (9th Cir. 1998)). Whether a particular State's procedural rule has been swallowed by judicially-created exceptions, however, is a fact-based, State-specific inquiry. It is not a question of law that creates a "split" necessitating the Court's intervention.

3. *Post-event decisions*: Maples complains that the Eleventh Circuit cited cases decided after 2003 to find that Alabama courts regularly followed the 42-day filing deadline. Pet. 20. As shown *supra* at 17-18, however, there are numerous Alabama decisions from before 2003 that demonstrate the state courts' enforcement of the rule—not to mention the hundreds of appeals dismissed each year that we cannot cite because they were never heard.

D. The Grant Of Certiorari Review In *Walker v. Martin* Has No Bearing On The Outcome Of This Case.

Finally, Maples asks the Court to grant review here as a "complement" to its grant of review in *Walker v. Martin*, No. 09-996. Pet. 21-24. The cases are inapposite.

Unlike Alabama's codified 42-day deadline, *Walker* concerns the adequacy of California's rule against "substantial delay" in filing state habeas petitions, a deadline that lacks a definite time period. *Martin v. Walker*, 357 Fed. Appx. 793, *2 (9th Cir. Nov. 20, 2009) ("[U]nlike other states, California has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines."). The Ninth Circuit held that California's undefined deadline was not adequate to bar the petitioner's five-year delay in filing a second habeas petition in May 2001 because California's "standard has yet to be defined" and the handful of decisions pre-dating May 2001 "do not

form a coherent pattern of consistent application." *Id.* at *1.

For habeas petitioners, the best outcome in *Walker* is that this Court affirms the Ninth Circuit's holding that a State's judicially-enforced time bar with no specific time limit is "inadequate." But that ruling is of no help to Maples, as Alabama's 42-day deadline has a definite end-date, which has been published in our Code for 35 years.

Because the decision in *Walker* has no effect on this case, the Court should not grant or hold Maples' petition pending *Walker's* outcome. If the Court does grant review here as a "compliment to *Walker*," Pet. 19, Alabama reserves the right to join the Criminal Justice Legal Foundation's call for "this Court [to] consider whether to scrap the 'adequacy' inquiry in habeas altogether," *Walker*, *supra*, CJLF Amicus Br. 15, in favor of the existing "cause and prejudice" and "actual innocence" exceptions to procedural default. Any analysis that concludes by finding that Maples did not have sufficient notice that he must follow a codified, mandatory filing deadline is fatally flawed.

II. MAPLES FAILED TO RAISE EITHER OF HIS "CAUSE AND PREJUDICE" ARGUMENTS BELOW.

Maples raises alternative theories to establish cause and prejudice for his procedural default. Maples argued neither theory below, and neither theory is supported by the facts.

A. Maples Affirmatively Disavowed The Argument That The State Circuit Clerk "Caused" His Failure To Appeal.

1. *Failure to Raise*: Maples first argues that the state circuit clerk's failure to contact Maples' Sullivan & Cromwell attorneys upon receiving their unopened mail constitutes "cause" sufficient to excuse the procedural default. Pet. 24-27. Maples claims in a footnote to have raised, and not subsequently waived, this argument below. Pet. 25, n.5. ("Although respondent conceded below that this argument was raised in Maples's opening brief, respondent argued that it was somehow waived at oral argument. Resp. Mot. To Review Oral Argument Record and/or Transcript at 2. That is incorrect.").

The record speaks for itself. In our Statement of the Case, *supra* at 11-12, the State quotes from all three appellate briefs to show that Maples' "clerical error" argument was targeted at Sullivan & Cromwell's mailroom clerk, not the circuit court clerk. We provide the Court with the page numbers of the oral argument transcript where Maples unequivocally repudiated the circuit-clerk-error argument and where he expressed, four times, that any clerical error occurred in Sullivan & Cromwell's New York mailroom. *See supra* at 14. We also attach our motion to transcribe the oral argument in its entirety *infra* at App. 1a-7a to refute any notion that the State conceded that Maples properly raised the circuit-clerk-error argument below.

Furthermore, here is what the court of appeals said about Maples' "clerical error" argument:

> At oral argument, Maples's attorney also acknowledged that, per Sullivan & Cromwell's internal policy, the Alabama court's Rule 32 Order should have been forwarded to the Sullivan & Cromwell attorneys who had taken responsibility for Maples's case after Munanka's and Ingen-Housz's departures. *But due to a clerical error in the Sullivan & Cromwell mailroom*, the firm instead returned the Rule 32 order to the trial court clerk.

Pet. App. 4a-5a, n.3 (emphasis added). Like the State, the court of appeals understood Maples' "clerical error" argument to be targeted at the Sullivan & Cromwell mailroom clerk, not the state circuit clerk, because Maples' attorney repeatedly said so at oral argument. That is why the court's opinion never mentions the circuit-clerk-error issue that Maples now claims to have raised.

Because Maples repudiated the argument that the state circuit clerk's actions constituted "cause," and the court of appeals therefore did not address the issue, the Court should refuse to address it in the first instance here. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts").

2. *Poor Factual Vehicle*: Even if Maples had raised the circuit-clerk-error question below, this

case presents a poor factual vehicle to resolve it. Undisputed facts show that the circuit clerk served all three of Maples' attorneys of record at their listed addresses as required by Alabama Rule of Criminal Procedure 34.4, and that Maples' local attorney promptly received and reviewed his copy. Pet. App. 223a, 256a. If the Court wishes to take a case to determine whether a court clerk's error may "cause" a petitioner to miss his filing deadline, it should not be a case in which (1) the clerk properly mailed copies of the court's final order to all three attorneys of record; (2) every copy arrived at the correct address; and, (3) one of the petitioner's attorneys admits to opening his copy and failing to act. In this case, as even the dissent agreed, "any such default is entirely the fault of [Maples'] post-conviction counsel." Pet. App. 30a (Barkett, J. dissenting).

Furthermore, regarding prejudice, Maples cites no evidence from the record that proves when the circuit clerk received the unopened envelopes back from Sullivan & Cromwell, Pet. 7, and the state court made no such finding. Pet. 222a-225a. Maples' evidence to the state court was only that the clerk informed him on August 22, 2003—*i.e.* more than a month after the 42-day deadline expired—that the unopened envelopes had been returned. Pet. App. 258a. Apparently, there is no evidence as to when that occurred. Accordingly, a factual question exists whether the clerk's alleged (in)actions prejudiced Sullivan & Cromwell's ability to file Maples' notice of appeal within 42 days.

B. Maples Failed To Argue Below That Attorney Abandonment "Caused" His Failure To Appeal.

Maples alternatively argues that attorney abandonment caused his default. Pet. 27-33. Maples recognizes the Court's holding in *Coleman* that post-conviction "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is acting as the agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Pet. 27 (quoting *Coleman*, 501 U.S. at 753). Maples therefore asks the Court to grant review to hold that *Coleman* does not apply to situations in which the attorney's abandonment of the petitioner ended their agency relationship, thereby establishing the cause that excuses procedural default. Pet. App. 27-32. According to Maples, he meets that proposed standard because he was "left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned." Pet. 29 n.6.

1. *Failure to Raise*: Maples did not raise this abandonment argument below. The reason is simple: Sullivan & Cromwell attorneys, who Maples now claims to have abandoned him, represented Maples throughout the lower federal court proceedings.

In both state and federal court, Maples' Sullivan & Cromwell attorneys went out of their way to note that Sullivan & Cromwell attorneys represented Maples at all times during his Rule 32

proceedings, including the 42-day period in which Maples' filing deadline lapsed. For example:

- Attorney De Leeuw swore in his August 2003 affidavit to the state circuit court that, after the departure of Sullivan & Cromwell's original attorneys in 2002, "other attorneys at S&C have worked on this case." Pet. App. 258a.

- In the same affidavit, Attorney De Leeuw swore that Sullivan & Cromwell attorneys had been preparing for an evidentiary hearing since December 17, 2001. *Id.*

- In his September 12, 2003 motion for admission *pro hac vice* in federal district court, Attorney De Leeuw affirmed that "I have worked on Mr. Maple's [sic] case for over a year." Doc #3 at 1.

- Sullivan & Cromwell Attorney Gary Alexion also affirmed to the district court on September 12, 2003 that "I have worked on Mr. Maple's [sic] case for over a year." Doc #2 at 1.

- Sullivan & Cromwell attorney Felice Duffy likewise affirmed on September 12, 2003 that "I have worked on Mr. Maple's case since October 14, 2002." Doc. #4 at 1.

As outlined *supra* at 14, Attorney De Leeuw also orally argued to the Eleventh Circuit that the Sullivan & Cromwell mailroom erred by not

forwarding him a copy of the state court's final order during the 42-day window to appeal.

Furthermore, local counsel John Butler maintained his agency relationship with Maples throughout Maples' Rule 32 proceedings. Attorney Butler admitted that he promptly received his copy of the court's dismissal order, and he filed an affidavit after the 42-day deadline passed to assist the Sullivan & Cromwell attorneys garner an out-of-time appeal. Pet. App. 255a-56a. So, even if Sullivan & Cromwell abandoned Maples (and it did not), Maples' local counsel, who shared equal responsibility, never did. *See* Rule VII(C), Alabama Rules for Admission to the Bar ("Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.").

The Court should not consider Maples' new "abandonment" argument, especially when it is contrary to Maples' position below. *See Freeland & Kronz*, 503 U.S. at 646 ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts").

2. *Poor Factual Vehicle*: Maples is in a pickle. Either his statement to this Court that he was "left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned" is factually incorrect, Pet. 29 n.6, or his former attorneys falsely swore to state and federal courts

about their continuous involvement during Maples' Rule 32 proceedings.

Either way, this is a terrible vehicle to decide whether attorney abandonment can excuse procedural default. Maples' agency relationship with Sullivan & Cromwell did not end until 2009, as demonstrated by the facts that (1) Sullivan & Cromwell attorneys have sworn that they were preparing for an evidentiary hearing when the May 2003 dismissal order was issued; (2) Maples' mother called Sullivan & Cromwell upon learning of the dismissal order; (3) Sullivan & Cromwell attorneys sought an out-of-time appeal throughout the state courts; and, (4) Sullivan & Cromwell attorneys represented Maples in both the district court and the court of appeals. Simply put, Maples' attorneys may have neglected Maples, but they never abandoned him.

3. *Federalism*: Adoption of Maples' "abandonment" argument carries major federalism concerns. If Maples is correct that the failure to timely file notices in state court can excuse the failure to exhaust state remedies, he has sketched the blueprint to side-step AEDPA deference in capital cases. Under Maples' theory, an attorney could agree to represent a capital petitioner, fail to timely file a state post-conviction petition, and then timely file a federal habeas petition. Because the attorney "abandoned" his client during the period in which the state petition had to be filed, and state law would bar a return to state court to file an untimely post-conviction petition, the federal petition could move forward, unencumbered by (1) the exhaustion

requirement, (2) the procedural default rule, and (3) §2254(d)'s deference to the (non-existent) state court opinion. The Court should resist any call to strip state courts of the first opportunity to decide questions arising from a state court judgment.

III. EVEN IF THE COURT GRANTS THE WRIT, MAPLES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS MAY STILL BE PROCEDURALLY DEFAULTED.

Maples asserts that, by granting the writ, the Court will assure that his IAC claims will be heard in federal court. *See* Pet. 11 ("[t]hose claims would have been heard if the Eleventh Circuit had properly followed this Court's precedent or this case had arisen in other circuits"). Maples is mistaken—or, at least, he fails to tell the rest of the story.

If the Court granted review and reversed the opinion below, Maples' failure to exhaust his post-conviction IAC claims in the state appellate courts would be irrelevant. But the lower courts still must review the opinion of the state circuit court, which did issue findings on Maples' IAC claims. Doc. #30, Tab 66 at 10-86. In its written order, the state circuit court summarily dismissed 33 of Maples' 34 IAC claims, in part, for failing to meet the pleading requirements of Alabama Rule of Criminal Procedure 32.6(b).[10] *Id.* In its answer to Maples' §2254

---

[10] The only IAC claim not dismissed in part for failing to satisfy Rule 32.6(b) was the claim that counsel was inherently ineffective due to inadequate compensation. Doc #30, Tab 66 at 10; *see also Hallford v. Culliver*, 379 F.Supp.2d 1232, 1279 (M.D. Ala. 2004) (denying the same claim on the merits).

petition, the State invoked two independent reasons that Maples' IAC claims are procedurally defaulted: (1) the circuit court's application of Rule 32.6(b) to summarily dismiss Maples' IAC claims and (2) Maples' failure to exhaust his state appeals. Doc. #29 at 23 ("Furthermore, the Morgan County Circuit Court dismissed this claim as insufficiently pleaded under Rule 32.6(b) of the Alabama Rules of Criminal Procedure, and Rule 32.6(b) is an adequate and independent state rule that precludes federal habeas relief.").

The district court did not address whether Rule 32.6(b) was a valid ground for procedural default because it was unnecessary; Maples' failure to exhaust his state appeals provided a sufficient bar to review. But two federal district judges have held in unpublished opinions that Rule 32.6(b) is an independent and adequate state procedural rule that procedurally defaults affected claims from federal habeas review. *See Williams v. Ferrell*, No. 07-0617-WS-M, 2008 WL 725105, at *2 (S.D. Ala. Mar. 17, 2008) ("This Court ... has held that claims not addressed by the state courts on the basis of Ala. R. Crim. P. 32.6(b) are procedurally defaulted."); *Reed v. Jones*, No. CIV. A. 970563RVL, 2000 WL 1848148, at *5 (S.D. Ala. Dec. 4, 2000) (holding that the state court's dismissal of a claim for failure to comply with Rule 32's specific pleading requirements "constitutes a sufficient statement resting on independent and adequate state grounds to bar" habeas review). The Eleventh Circuit Court of Appeals has similarly held that Rule 32.6(b) is an independent and adequate state procedural rule, albeit in an unpublished opinion. *See Jenkins v. Bullard*, 210 Fed. Appx. 895,

898-900 (11th Cir. Dec. 13, 2006) (unpublished). Accordingly, even if the Court ultimately granted the writ, nothing would change. In all likelihood, after another five years (or more) of litigation, Maples' IAC claims would still be procedurally defaulted.

In sum, Maples asks this Court to grant review to declare one State's procedural rule (Alabama's) inadequate for one distinct moment in time (May 2003) to the benefit of one person (Maples). Because even that person may not benefit from the Court's opinion, whatever it may be, the Court should decline review.

* * *

The Court has seen a collective plea to excuse a late filing before. In *Northwest Airlines, Inc. v. Spirit Airlines*, No. 06M7, attorney error caused the petitioner to miss this Court's 90-day filing deadline by five days. *See* Gressman & Geller, *supra*, 388. Backed by two former Solicitors General as amici, Northwest Airlines asked the Court to accept its untimely petition and grant review. *See id.* The Court declined without comment. 127 S.Ct. 340 (2006). Maples and his amici present a similar request, which the Court should similarly reject.

In fact, Maples' petition presents federalism concerns absent in *Northwest Airlines* and *Holland v. Florida*, 130 S.Ct. 2549 (2010), in which the Court held that "extraordinary circumstances" could equitably toll AEDPA's one-year deadline for filing federal habeas petitions. *See* Pet. 27-31 (likening this case to *Holland*). A federal court's decision to excuse a petitioner's failure to comply with a *federal*

rule is a far cry from a federal court excusing a petitioner's failure to satisfy mandatory *state* rules. To excuse Maples' failure to appeal the denial of his Rule 32 petition in state court would allow Maples to by-pass state appellate review of a state court judgment by declaring the inadequacy of a state procedural rule—a rule that is substantially similar to one applied by this Court and, we assume, every appellate court in the country. Just last Term, the Court noted how leery it was of treading these waters. *Beard*, 130 S.Ct. at 618 ("In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."). The Court should not tread them here.

CONCLUSION

The Court should deny Maples' petition.

Respectfully submitted,

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

Office of the Atty. General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300
cmaze@ago.state.al.us

August 20, 2010

APPENDIX

Motion to Review Oral Argument Recording And/Or Transcript 1a

Order Dated Jan. 25, 2010 ..... 8a

Order Dated Feb. 9, 2010 ..... 10a

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CORY R. MAPLES,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Case No.07-15187-P
	)	
RICHARD F. ALLEN,	)	
	)	
Respondent-Appellee.	)	

MOTION TO REVIEW ORAL ARGUMENT RECORDING AND/OR TRANSCRIPT

Appellee Richard Allen believes it likely that Maples' former counsel conceded an argument forwarded by his new counsel in Maples' pending Petition for Rehearing and Rehearing En Banc. Because neither new counsel for Maples, nor the undersigned counsel, can be sure without reviewing the oral argument, Commissioner Allen requests either (1) both parties be allowed to review a recording or transcript of the May 18, 2009 oral argument or (2) this Court review the recording and specifically address the concession question in writing. In support of his motion, Commissioner Allen offers the following:

Background

1. The issue in question is whether Maples can establish "cause" to excuse the procedural default stemming from his failure to timely file a notice of appeal from the dismissal of his state post-

conviction petition. *See* Panel Slip. Op. at 18-20. The panel majority held that Maples could not establish "cause" because any fault for the failure to appeal the state court's dismissal order lies solely with Maples' post-conviction counsel. *Id.*

2. Since the panel issued its opinion, Maples has changed counsel. In Maples' Petition for Rehearing and Rehearing En Banc, Maples argues that fault lies with the circuit clerk, a State actor. *See* Petition for Rehearing and Rehearing *En Banc* at 10-13 ("The panel majority refused to recognize that *the State's* own failure 'to properly deliver' notice of the denial of Maples's Rule petition—where the trial court clerk did nothing after receiving the unopened and unclaimed letters sent to Maples's lead counsel—itself constituted cause."). The National Association of Criminal Defense Lawyers makes the same argument. *See* Br. of Amicus NACDL 12-15.

3. Maples correctly cites his original blue brief for the proposition that he raised this argument to the panel. *See* Petition for Rehearing and Rehearing *En Banc* at 10 (citing Blue Br. 18 n.2, 21). But counsel for Commissioner Allen believe that Maples' previous counsel conceded this argument at oral argument before the panel.

4. The seeds of concession sprung before oral argument. In his brief, the Commissioner argued that, to meet the "cause" standard, Maples was attempting to wrongly "shift the blame away from his post-conviction attorneys to the circuit clerk." Red Br. at 21. Maples replied that he was not "seeking to shift the blame to the circuit clerk or anyone else." Reply Br. at 9. Instead, Maples argued that "clerical error was to blame;"

specifically, "a mailroom oversight.[1]" Reply Br. at 8-9. (As later recounted by the panel majority, instead of Maples' post-conviction attorneys opening and reviewing the state court's order, "due to a clerical error in the Sullivan and Cromwell mailroom, the firm instead returned the Rule 32 order to the trial court clerk." Slip. Op. at 5, n.3.)

5. Commissioner Allen believes that Maples then fully conceded the "circuit clerk was the cause" argument during oral argument before the panel on May 18, 2009. Specifically, we believe that an exchange between Judge Barkett and Maples' previous counsel touched on the question of whether post-conviction counsel was solely to blame, or whether the State shared in the fault. Counsel for the Commissioner believe that Maples' counsel conceded to Judge Barkett during that exchange that blame—and thus "cause"—lies solely with Maples' post-conviction counsel. Our belief is bolstered by Judge Barkett's dissenting opinion, which states, "any such default is entirely the fault of his post-conviction counsel." Slip. Op. at 33 (Barkett, J. dissenting). But, admittedly, that exchange occurred almost eight months ago, and neither of the Commissioner's attorneys who were present can honestly aver to this Court that we can recollect precisely what was said by whom. That is why we seek review of the oral argument.

---

[1] Whether Maples conceded or waived his "circuit clerk was the cause" argument during briefing is admittedly debatable, and this motion is not the proper vehicle for that debate.

Motion for Counsel to Review the Argument

6. Up front, the Commissioner acknowledges Circuit Rule 34-4(g) mandates that the recording and transcript and argument are for the "exclusive" use of the Court, not the parties' attorneys. We respect that rule. The Commissioner therefore realizes that a request for the attorneys to review the oral argument is likely frivolous.

7. That said, the Commissioner requests that counsel for both parties be given access to the argument to ensure that a conceded argument is not being forwarded to this Court on rehearing. Furthermore, the presence of three amicus briefs on rehearing makes it obvious (at least in the Commissioner's view), that Maples intends to seek certiorari review in the Supreme Court should his rehearing be unsuccessful. It is in neither party's interest to present this Court, or the Supreme Court, with a conceded argument. And without access to the oral argument, Maples' new counsel will not know if he is pushing an argument conceded by his predecessor, and the Commissioner will be at a disadvantage in pleading a defense to the claim (should the Commissioner's recollection be correct).

Motion for Counsel to Review and Comment on the Argument

8. Should the Court deny the request for counsel to review the oral argument, the Commissioner requests this Court review the argument and comment on whether Maples conceded the argument that a State actor constituted "cause" for his procedural default in a future written order or opinion. We make the request for a written comment

because strict application of Circuit Rule 34-4(g) would prevent the parties, and perhaps even the Supreme Court, from obtaining the answer to the concession issue if and when this case proceeds to that Court. Certainly, Maples does not want to seek certiorari review on an issue previous counsel conceded. Nor does the Commissioner want to assert a defense that is factually inaccurate.

Conclusion

9. The Commissioner makes two final notes. First, the undersigned counsel fully acknowledges that neither he nor co-counsel (who was also present at the argument) are 100% positive that Maples' previous counsel conceded the argument. We are proceeding solely on our (very human) recollection of the argument and the questioning. Second, this motion is no way casts aspersion on Maples' new counsel, Gregory Garre, who is similarly unable to review previous counsel's argument(s). To the contrary, the undersigned and Mr. Garre have spoken about this issue on more than one occasion, and it is fair to say that Mr. Garre equally shares our desire that the proper arguments and facts are before this Court.

For the reasons stated above, Commissioner Allen requests this Court either (1) suspend Circuit Rule 34-4(g) and allow counsel for both parties to review either a recording or transcript of the May 18, 2009 oral argument or (2) review the oral argument and comment on whether Maples conceded that a State actor did not establish "cause" for his procedural default.

Respectfully submitted,

TROY KING
Attorney General

s/ Corey L. Maze
COREY L. MAZE
Solicitor General

State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130-0152
(334) 353-4336
cmaze@ago.state.al.us

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2010, I filed the foregoing and served copies on Appellants' counsel of record, and counsel for amicus curiae, by placing them in the United States Mail, first class, postage prepaid, addressed as follows:

Gregory G. Garre
Latham & Watkins LLP
555 11th Street NW, Suite 1000
Washington, DC 20004-1304

Robert A. Schwartz
Arnold & Porter LLP
555 12th Street, NW
Washington, DC 20004-1206

Jonathan S. Franklin
Fulbright & Jaworski LLP
801 Pennsylvania Ave., NW
Washington, DC 20004

Joseph P. Van Heest
1019 South Perry Street
P.O. Box 4026
Montgomery, AL 36103-4026

s/ Corey L. Maze
COREY L. MAZE
Solicitor General

ADDRESS OF COUNSEL:

State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130-0152
(334) 353-4336
(334) 353-3637 Fax
cmaze@ago.state.al.us

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 25 2010
THOMAS K. KAHN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 07-15187-P

CORY R. MAPLES,

Petitioner-Appellant,

versus

RICHARD F. ALLEN, Commissioner of the Alabama Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

ORDER:

Given that both parties agree that a transcript of the oral argument may facilitate the accuracy of the parties' representations about what did or did not occur at oral argument, the Court grants Respondent-Appellee's motion to have the oral argument transcribed and a copy of that transcript provided to both parties. The Court expressly notes, and relies on the fact, that counsel for Petitioner-

Appellant has filed a Response encouraging the Court to grant Respondent-Appellee's motion. In addition, it is material to the Court that the Court's opinion of October 26, 2009 expressly refers to some things mentioned at oral argument.

A certified court reporter has advised the Clerk's Office that the cost of the transcript will be approximately $200-275. The Court will have the court reporter transcribe the oral argument as soon as the movant Respondent-Appellee faxes a letter to the Court stating that the Respondent-Appellee will be responsible for the costs of having the oral argument transcribed by the court reporter. Upon filing of the transcript, the Court will advise the Respondent-Appellee of the final cost. Upon payment by Respondent-Appellee, the Court will provide copies of the transcript to both the Respondent-Appellee and Petitioner-Appellant.

FRANK M. HULL
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 09 2010
THOMAS K. KAHN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 07-15187-P

CORY R. MAPLES,

Petitioner-Appellant,

versus

RICHARD F. ALLEN, Commissioner of the Alabama Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

ORDER:

Upon further consideration, the Court *sua sponte* modifies its Order dated January 25, 2010, to provide that there will be only one copy of the oral argument transcript which will be kept in the Clerk's Office of the Court in Atlanta, Georgia, and will be made part of the record in this appeal. After payment is made by the State, the Clerk will provide a copy of the transcript to the Respondent-Appellee and Petitioner-Appellant to review and then each such

party shall return their copy to the Clerk of Court within 60 days. No parties shall make copies of the transcript. Each party shall return their sole copy provided after 60 days. The Court has determined that there should be only one official transcript, and that it should be maintained in the Clerk's Office.

FRANK M. HULL
UNITED STATES CIRCUIT JUDGE

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 0 1 2010
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE ADEQUACY ISSUE MERITS REVIEW .. 3

II. THE CAUSE ISSUE MERITS REVIEW 8

CONCLUSION 12

ADDENDUM

Excerpts of Briefs And Other Material 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Coleman v. Thompson,
501 U.S. 722 (1991) 10

Jenkins v. State,
12 So. 3d 166 (Ala. Crim. App. 2008) 6

Jones v. Flowers,
547 U.S. 220 (2006) 2, 8

King v. State,
881 So. 2d 542 (Ala. Crim. App. 2002) 6

Marshall v. State,
884 So. 2d 898 (Ala. Crim. App. 2002) 5

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 3

Noble v. State,
708 So. 2d 217 (Ala. Crim. App. 1997) 6

Russ v. State,
853 So. 2d 1034 (Ala. Crim. App. 2002) 4, 7

Schacht v. United States,
398 U.S. 58 (1970) 7

TABLE OF AUTHORITIES—Continued

Page(s)

RULES

Supreme Court Rule 10 1

Alabama Rule of Appellate Procedure 1 4

Alabama Rule of Appellate Procedure 4(a)(1) 4

Alabama Rule of Criminal Procedure 32.1(f) ..... *passim*

Alabama Rule of Criminal Procedure 34.4 10

OTHER AUTHORITY

Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/B07Mar09.pdf 11

INTRODUCTION

As explained in the petition, the divided Eleventh Circuit decision below directly conflicts with the decisions of this Court and other circuits on the gateway standards governing both when a purported state procedural rule is "adequate" as a matter of federal law to bar habeas review of constitutional claims, and when "cause" exists to excuse any default. As underscored by *amici*, as well as the recent grant of certiorari in *Walker v. Martin*, No. 09-996, the proper contours of those standards is a matter of exceptional national importance, and the ability to obtain federal court review of constitutional claims should not vary from one circuit to the next. The traditional criteria for certiorari are therefore satisfied. S. Ct. R. 10.

In response, the State focuses its efforts on mischaracterizing the questions presented and attempting to manufacture hurdles to reaching them. On the adequacy question, the State tries to redirect the focus to the general 42-day deadline for appeals. But that is just a smokescreen. As the State explicitly recognized below, Ala.R.Crim.P.32.1(f) establishes a "no-fault, out-of-time appeal rule" for post-conviction proceedings. CA11 Appellees Br.16. And, as the dissent below explained, Alabama courts have allowed untimely appeals under Rule 32.1(f) in "indistinguishable" circumstances. Pet.App.30a. The split decision below concluding that Alabama has a "firmly established and regularly followed" rule *barring* appeals in such circumstances is based on a *post hoc* reformulation of Alabama case law that even the State does not seriously defend. Pet.12-21.

The State does not deny that the adequacy doctrine is widely regarded as confused and in need of

clarification. Pet.12-13. The State suggests that the adequacy issue *in this case* presents a "State specific inquiry." Opp.27. But given the nature of the inquiry, the same could be said in *any* adequacy case. And more to the point, the first question presented concerns the *standards* that govern the adequacy determination—a matter of general and unquestioned importance. Ultimately, the State reveals that its position is that the adequacy doctrine should be "'scrap[ped] ... altogether.'" Opp.29. And that is where its arguments in support of the decision below lead. But this case graphically illustrates the need for an adequacy safeguard to ensure that federal claims are not barred by arbitrary assertions of state law.

On the question of cause, the State makes virtually no effort to defend its actions on the merits. The State does not even *cite*—much less attempt to distinguish—the decision of this Court establishing that the State failed to provide constitutionally adequate notice to Maples of the denial of his post-conviction petition. *Jones v. Flowers*, 547 U.S. 220 (2006). That external constitutional violation establishes cause for any default. Pet.24-27. Instead of confronting *Jones*, the State simply cries waiver. But the State has explicitly *conceded* that this argument was briefed below, Opp.Add.2a, and counsel by no means repudiated it at oral argument. This waiver argument, in other words, is just another ploy to evade review.

In the end, the State's main point seems to be that courts "routinely" dismiss untimely appeals so why bother with this case. Opp.15; *see* Opp.1-2, 39-40. Never mind that a man's life is at stake. Never mind that the State contributed to the missed deadline—when a clerk received the unopened envelopes mailed

to Maples's lead counsel stamped "Return to Sender—Left Firm," and did nothing. And never mind that Alabama has an express "no-fault, out-of-time appeal rule." In the State's view, this case is "no different" than the run-of-the-mill civil case. Opp.15. This Court, however, has never taken such a cavalier attitude toward the cases that reach its steps.[1]

I. THE ADEQUACY ISSUE MERITS REVIEW

In holding that Alabama had adopted a firmly established and regularly followed rule *barring* untimely appeals in Maples's situation, the Eleventh Circuit devised *post hoc* a tripartite framework out of Alabama case law applying Rule 32.1(f) based in large part on cases decided *after* the events at issue and on distinctions that the Alabama courts themselves have never drawn. Pet.17-18; Pet.App.13a. That revisionist approach directly contravenes this Court's teaching that a federal court may not manufacture a firmly established and regularly followed rule by reconceiving state law "in retrospect." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958). The State does not attempt to defend the Eleventh Circuit's tripartite test, or its reliance on cases decided *after* the events at issue—in direct conflict with other circuits. Pet.20-21.

Instead, the State grounds its response on a new argument that is even more at odds with state law.

---

[1] The decision below bars federal review of serious ineffective-assistance-of-counsel claims. Pet.3-4; Pet.App.30a-31a & n.3. The State briefly tries to defend (Opp.5 n.1) counsel's decision to forego an intoxication defense, but it ignores its own witness's testimony that Maples used crack and crystal methamphetamine that night. Pet.3. Moreover, the State completely overlooks counsel's fundamental failures at the penalty phase. Pet.4-5.

The State claims that Rule 32.1(f) is essentially irrelevant—relegating that rule to a footnote (Opp.17 n.5)—and argues that the basic 42-day deadline for appeals (Ala.R.App.P.4(a)(1)) is the beginning and end of the adequacy analysis. In other words, the State asks the Court to pretend that Rule 32.1(f) does not exist. But the State has recognized that Rule 32.1(f) is a stand-alone "out-of-time appeal rule" and, indeed, argued below that it was "firmly established." CA11 Appellees Br.16-21. Rule 4(a) in no way supersedes Rule 32.1(f) or cases applying it. Ala.R.App.P.1.[2]

In a footnote, the State now suggests that Rule 32.1(f) "did not apply to post-conviction petitioners like Maples until January 2005"—citing a case decided *after* the events at issue. Opp.17 n.5. But in 2003, the State argued that Rule 32 was the "proper method" for an out-of-time post-conviction appeal, and acknowledged that a writ of mandamus to pursue such an appeal was likewise governed by Rule 32. Add.1a-2a. The State also has conceded that Maples pursued the "proper vehicle" for his out-of-time appeal. CA11 Appellees Br.19. Moreover, at all relevant points, Alabama law recognized that Rule 32.1(f) *did* apply to post-conviction appeals. Pet.13; Alabama Justices Br.12-13; ACDLA Br.7-8 & n.3; *see also, e.g., Russ v. State*, 853

---

[2] The State claims that untimely appeals are "regularly" dismissed under Rule 4(a)(1). Opp.17. But all the cases it cites for that proposition fall *outside* of the realm of Rule 32.1(f). Opp.17-18. The fact that Alabama courts dismiss untimely appeals outside the Rule 32.1(f) context in no way suggests that Alabama has a firmly established rule against untimely appeals for cases, such as this, that fall *within* Rule 32.1(f). Likewise, the fact that litigants have "notice" of Rule 4(a)(1) hardly means that they are on notice that Rule 32.1(f) will be arbitrarily disregarded. Opp.18-19.

So. 2d 1034 (Ala. Crim. App. 2002). To the extent the State suggests there is case law to the contrary, it at best indicates there was no *firmly established* rule.

The State's interpretation of the extant Alabama case law—just like the Eleventh Circuit's—is a transparently *post hoc* rationalization. Alabama courts have consistently granted out-of-time appeals in circumstances that are analogous and, indeed, even "indistinguishable" (Pet.App.30a). Pet.15; ACDLA Br.3-12. Given that body of law, the Eleventh Circuit's holding that the State has established a "firmly established and regularly followed" rule *against* allowing untimely appeals in Maples's situation renders this Court's adequacy doctrine meaningless.

The State attempts to reinvent *Marshall* by arguing that "[1] [Marshall] was proceeding *pro se* and [2] the clerk assumed a duty to serve him, but failed to do so." Opp.21. The first ground is inaccurate. Marshall had counsel when his Rule 32 petition was denied; that is why he alleged "his *counsel* rendered ineffective assistance by failing to inform him that his first Rule 32 petition had been dismissed." *Marshall v. State*, 884 So. 2d 898, 898-99 (Ala. Crim. App. 2002) (emphasis added); *see* Pet.App.14a n.9 (Rule 32 petition was "counseled"). The second ground just invents a rationale not found in the Court of Criminal Appeals' decision in *Marshall*, and in any event fails to distinguish this case. Pet.16 & n.3; Pet.App.29a & n.2.

The State invites this Court to take "a quick perusal" of the record in *Marshall* and take judicial notice of supposedly important facts *not mentioned* in the court's decision. Opp.22. But that record confirms that Marshall was represented by counsel when his Rule 32 petition was denied. And more important,

judicial decisions are ordinarily taken at face value. The State cannot plausibly contend that Alabama defendants must review not only the decisions but the underlying record in decided cases to unearth distinctions or rationales the decisions do not mention.[3]

The State claims that the numerous other cases cited by Maples and *amici* are distinguishable because they involved *pro se* petitioners. Opp.21 n.8. But Rule 32.1(f) does not distinguish between *pro se* and counseled petitioners. Nor does the case law. Regardless, Jenkins was not *pro se*. *Jenkins v. State*, 12 So. 3d 166, 166 (Ala. Crim. App. 2008) (referring to Jenkins's "attorney"). And the State admits that the defendant in *Thompson* had counsel. Opp.21 n.8.

In a last-ditch effort to get around Rule 32.1(f), the State suggests—for the first time—that Rule 32.1(f)'s no-fault, out-of-time appeal rule is wholly discretionary. Opp.20. According to the State, the rule only allows a defendant "to request" an out-of-time appeal. Opp.17 n.5. That is incorrect. While the *fault* determination may entail some judgment, Pet.23, Alabama courts have long treated the ultimate relief as mandatory when the no-fault requirement is satisfied. *See, e.g.*, *Noble v. State*, 708 So. 2d 217, 217 (Ala. Crim. App. 1997) ("If the failure to timely file the notice of appeal was through no fault of the appellant's, he is *entitled* to an out-of-time appeal.") (emphasis added); *King v. State*, 881 So. 2d 542, 543 (Ala. Crim. App. 2002)

---

[3] The State also theorizes that an out-of-time appeal was allowed in *Marshall* only because the Constitution required it. Opp.22-23. *Marshall* did not say that, and both the text of Rule 32.1(f) and the case law applying confirm that it is not so limited. In any event, barring an appeal here *does* violate due process. Pet.24-27.

(recognizing the petitioner's "right" to an out-of-time appeal in certain circumstances); *Russ*, 853 So. 2d at 1035 (holding that the trial court "shall grant" an out-of-time appeal if Russ received inadequate notice of the denial of his Rule 32 petition). The State does not dispute that Maples was without fault, so any discretionary aspect of Rule 32.1(f) is inapplicable.

The State points to this Court's 90-day filing deadline for certiorari. Opp.24-26, 39-40. But this Court—unlike Alabama—does not have an express "no-fault, out-of-time appeal rule." This Court's precedent offers only the generalized guidance that the Court can relax procedural rules "in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970). That is a good example of a discretionary rule. But it just underscores that Rule 32.1(f) is the *antithesis* of such a rule, and that the State is quite wrong in claiming that the Alabama law on untimely appeals is just like the law in "every appellate court in the country." Opp.40.

The adequacy question presented by this case is a subject of multiple circuit conflicts. Pet.19-21. Instead of disputing the existence of those conflicts, the State asserts that they do not warrant review. Opp.27-28. But these conflicts are squarely implicated and outcome determinative, and thus provide a sufficient basis for certiorari. The availability of federal court review of constitutional claims on habeas should not vary based on *where* a habeas petition is filed.

This Court recently granted review in *Walker* to consider whether a California rule is adequate. At a minimum, this case should be held for *Walker*. But this case independently warrants certiorari, and the Court would be able to provide far more meaningful guidance

on the adequacy doctrine if it set this case for argument with *Walker*. NACDL Br.6-23. The stakes are enormous because some—including the State here—have suggested that this Court should "scrap" the adequacy doctrine altogether. Opp.29. This case underscores why that would be seriously ill-advised.

II. THE CAUSE ISSUE MERITS REVIEW

When it comes to the cause issue, the State takes its avoidance efforts to the next level. Astonishingly, the State does not even mention, much less discuss, *Jones v. Flowers*. That case establishes that the State failed to provide constitutionally adequate notice to Maples. Pet.24-27. That constitutional violation unquestionably establishes cause for any default. The State's only real response is to cry waiver. That argument fails.[4]

Indeed, the State has *conceded* that Maples raised this argument below, as the State's own appendix

---

[4] The State inexplicably suggests that the clerk may not have timely received the unopened letters by return mail. Opp.32. Maples has never received an evidentiary hearing on the events at issue because of the erroneous default ruling. But Maples would welcome such a hearing and, to be clear, Maples's counsel long ago confirmed that the clerk received the unopened returned envelopes—and just stuck them in a file. Add.7a-8a.

The State also suggests that a letter to local counsel was enough. Opp.32. But a scheme must be "reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230. The State admits that *86%* of its capital inmates are represented by out-of-state attorneys or the Equal Justice Initiative, Opp.16 n.4, and knows that local counsel in such proceedings "most often do nothing other than provide the mechanism for foreign attorneys to be admitted," Alabama Justices Br.18. It is thus patently unreasonable for the State to do nothing when it knows that notice to out-of-state attorneys has failed.

confirms. Opp.App.2a ¶¶2-3 ("Maples argues that fault lies with the circuit clerk, a State actor ... Maples correctly cites his original blue brief for the proposition that he raised this argument to the panel."); Add.2a-6a. The State nevertheless claims that Maples inexplicably waived this point during oral argument. Opp.30. But counsel for Maples never explicitly repudiated the argument made in his own brief. Nor did the Eleventh Circuit find otherwise. That should be the end of the matter—particularly since this Court undeniably has the authority to address the issue even if it had *not* been raised below. Pet.25 n.5.

In any event, in his briefs Maples pointed to *both* (1) the clerical error by the New York mailroom in handling the letters, *and* (2) the state clerk's failure to do anything when it received the unclaimed letters in the return mail. The State focuses on an exchange at oral argument about the New York mailroom error and counsel's comment that he was not "shifting the blame" to the state clerk. That comment simply acknowledges that multiple failures, including the state clerk's inaction, contributed to the missed deadline, and no single actor was to blame. While the court clerk was not at fault for mailroom errors in New York, Maples has always argued that cause was independently established when the clerk "took no action" once he received the returned unopened letters. Add.4a.

The State's response is equally unconvincing when it comes to attorney abandonment. Pet.27-32. Instead of defending the decision below, the State again argues waiver. And again it is wrong. The State urged below that Maples had argued cause based on "his attorneys' failure to act." CA11 Appellees Br.22. In his brief, Maples explained that his *pro bono* attorneys had left

the case and local counsel was uninvolved. CA11 Maples Br. 9-10. So the State is really just arguing about whether Maples was actually abandoned. But more fundamentally, the problem is that the Eleventh Circuit short-circuited the cause inquiry altogether because it erroneously believed *Coleman v. Thompson*, 501 U.S. 722 (1991), controlled. Pet.App.17a; Pet.27-32.

The State suggests that Maples was represented by Sullivan & Cromwell (S&C) throughout. But "[l]awyers at S&C handle *pro bono* cases on an *individual* basis," Pet.App.257a (emphasis added)—thus, notice was addressed to counsel of record *individually*. Add.7a-8a. Moreover, while other lawyers were working on the case, Pet.29 n.6, none of those lawyers had even yet been admitted *to practice* in Alabama, Pet.App.229a, much less had entered their appearance as counsel in Maples's case. Had they been Maples's lawyers, Alabama would have been required to mail them notice of the order. Ala.R.Crim.P.34.4.

The standard for determining whether cause exists in this context is unquestionably important. And the Eleventh Circuit's conclusion that Maples did not establish cause not only is wrong under this Court's precedents; it conflicts with the decisions of numerous other courts. Pet.29-31; Constitution Project Br.7-19.

* * * * *

The result reached in this capital case is "intolerable." Constitution Project Br.18. But the important questions presented are by no means limited to this case. Indeed, the Eleventh Circuit has the third highest number of habeas petitions filed each year (706), and the third highest number of petitions in

capital cases (34), of any federal circuit.[5] The decision below has great consequences for habeas petitioners in that Circuit. Moreover, the decision further unsettles a vital area of law that necessitates clarification by this Court. Further review is warranted.[6]

---

[5] Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, Table B-7, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/B07Mar09.pdf.

[6] The State's suggestion (Opp.37-38) of a default under Ala.R.Crim.P.32.6(b) is a red herring and just underscores its "gotcha" mentality. The Alabama post-conviction court *rejected* the State's motion to dismiss Maples's detailed, 100-page petition on this basis. Order, *Maples v. Alabama*, No. CC-95-842.60 (Ala. Cir. Ct. Dec. 27, 2001) ("[T]he Petition is sufficiently pled"). The analysis of the particular claims in the court's subsequent order likewise makes clear that the claims were dismissed as "without merit," not for insufficient pleading. In any event, the State may raise this meritless argument on remand, but it provides no basis for denying review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

September 1, 2010

Counsel for Petitioner

ADDENDUM

TABLE OF CONTENTS

Excerpts of Briefs And Other Material 1a

ADDENDUM

1. The following portions of the record reflect Alabama's recognition below that Rule 32 governs out-of-time appeals—and did so prior to 2005—and that an out-of-time appeal pursuant to Rule 32 was available pursuant to a petition for a writ of mandamus:

***Maples v. Allen*, Case No. CC-95-842.60, Response to Maples's Motion for the Court to Reissue Its May 22, 2003 Order Denying His Rule 32 Petition (Ala. Cir. Ct. Sept. 2, 2003)**

- "The proper method for a Rule 32 petitioner to seek an out-of-time appeal from the denial of a Rule 32 petition is to file a separate Rule 32 petition indicating why the petitioner's failure to appeal was no[t] the fault of the petitioner." *Id.* at 2.

***Maples v. State*, No. CR-03-0021, State of Alabama's Response to Cory R. Maples' Petition for Writ of Mandamus to the Circuit Court of Morgan County, Alabama (Ala. Crim. App. Nov. 26, 2003)**

- "*Marshall II* stands only for the proposition that a petition for writ of mandamus is the only vehicle for obtaining the remedy of an out-of-time appeal under Rule 32 of the *Alabama Rules of Criminal Procedure*." *Id.* at 4.

***Maples v. Allen*, No. 07-15187-P, Brief of Respondent-Appellee (11th Cir. Dec. 11, 2008)**

- "Criminal Rule 32.1(f) is the vehicle to seek a 'no fault,' out-of-time appeal when an inmate cannot meet the jurisdictional filing rules of Appellate Rules 2(a) and 4(b)(1). The availability of a no-fault, out-of-time appeal rule is Alabama's recognition that, in some circumstances, a defendant/petitioner's failure to meet the jurisdictional 42-day filing deadline is due to mistakes by the court, the clerk, or state appointed counsel—not the defendant/petitioner." *Id.* at 16.

2. The following portions of the record reflect Maples's argument below concerning the state clerk's failure to do anything after receiving the unopened and unclaimed letters sent to *pro bono* counsel of record:

***Maples v. Campbell*, No. CV 03-B-2399-NE, Amended Petition for Writ of Habeas Corpus by Prisoner in State Custody Under Death Sentence (N.D. Ala. May 23, 2005)**

- "10. On May 22, 2003, the Alabama court summarily denied Mr. Maples' petition. The Court's order was mailed to counsel of record. In the almost two years between the filing of Mr. Maples' Petition and its denial, the two Sullivan & Cromwell lawyers who were counsel of record left the firm. The envelopes containing their copies of the May 23, 2003 Order were returned to the Alabama court unopened, with a prominent handwritten notation

on one of the envelopes: 'Return to Sender – Left Firm.'" *Id.* at 3 (footnote omitted).

- "11. Although Mr. Butler's firm received and opened his copy of the Order, Mr. Butler did nothing—assuming that his role in the case was limited to moving for the admission of the Sullivan & Cromwell attorneys and further assuming that they would handle the contemplated appeal. The Court also did nothing. It did not attempt to forward the returned envelopes. Nor did it attempt to contact local counsel or to schedule a status conference to clear up any ambiguity concerning Mr. Maples' representation." *Id.*

***Maples v. Campbell*, No. CV 03-B-2399-NE, Cory Maples' Reply Brief and Request for an Evidentiary Hearing Pursuant to March 9, 2005 Order (N.D. Ala. Dec. 19, 2005)**

- "Cause is shown when 'some objective factor external to the defense impede[s] counsel's [or petitioner's] efforts to comply with the State's procedural rule.' *Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999); *Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000). In this instance, as set forth in the Petition (¶¶ 8-12) and *supra* (pp. 11-12), the order dismissing Mr. Maples' Rule 32 petition—which was issued by the Court *sua sponte* more than 1½ years after it had denied Respondent's motion to dismiss and at a time when the parties expected scheduling of further proceedings or a hearing—never reached Mr. Maples, individually or through his primary counsel. The order that was

sent to Mr. Maples' lawyers in New York (who were primarily responsible for his representation) was returned to the state court with the words 'Return to Sender – Left Firm' written prominently on its envelope. (Petition ¶ 10.) The state court made no attempt to have the order forwarded to Mr. Maples or to contact local counsel to clear up any ambiguity regarding Mr. Maples' representation or the appropriate mechanism for delivery of this time-sensitive document." *Id.* at 27-28.

***aples v. Campbell*, No. CV 03-B-2399-SLB-PWG, ›ry Maples' Motion to Alter or Amend the ıdgment Pursuant to Federal Rule of Civil ·ocedure 59(e) (N.D. Ala. Oct. 16, 2006)**

"As explained in his petition and brief to this Court, Mr. Maples missed the deadline to appeal the dismissal of his Rule 32 petition through no fault of his own. Mr. Maples was unaware of the deadline to appeal his Rule 32 petition, because he never received the state court's *sua sponte* order dismissing the petition. Indeed, the state court was aware that Mr. Maples likely did not receive the order because the copy sent to his primary counsel was returned to the clerk's office. Although the clock was ticking, the clerk's office took no action to deliver this time-sensitive document to Mr. Maples, or to locate his primary attorneys and properly deliver it to them. This is sufficient to demonstrate the 'cause' prong." *Id.* at 22.

***Maples v. Allen*, No. 07-15187-P, Brief of Cory R. Maples (11th Cir. Sept. 24, 2008)**

- "After the court's decision denying Mr. Maples' Rule 32 petition was returned to and received by the court with the words 'Return to Sender – Left Firm' written prominently on the envelope, the court did not take any measures to ensure Mr. Maples received notification of the decision on a timely basis." *Id.* at 18 n.2.

- "Therefore, Mr. Maples has established cause by the very fact that he never received a copy of the State's *sua sponte* order dismissing his Rule 32 petition. Cause exists when a court fails to properly deliver the required documents so that a petitioner may timely effect an appeal. Because Mr. Maples' appeal 'was frustrated through no fault of his own,' he has demonstrated 'cause to excuse his default.'" *Id.* at 21 (citations omitted).

***Maples v. Allen*, No. 07-15187-P, Reply Brief of Cory R. Maples (11th Cir. Feb. 2, 2009)**

- "*Second*, although not disputing that 'cause' is shown where an external factor impedes petitioner's efforts to comply with a state procedural rule, the State mischaracterizes Mr. Maples' argument as an effort to 'shift the blame ... to the circuit clerk.' (Appellee Br. at 21-22.) In fact, Mr. Maples demonstrated cause by showing (and it is undisputed) that he never received a copy of the Alabama court's order dismissing his Rule 32

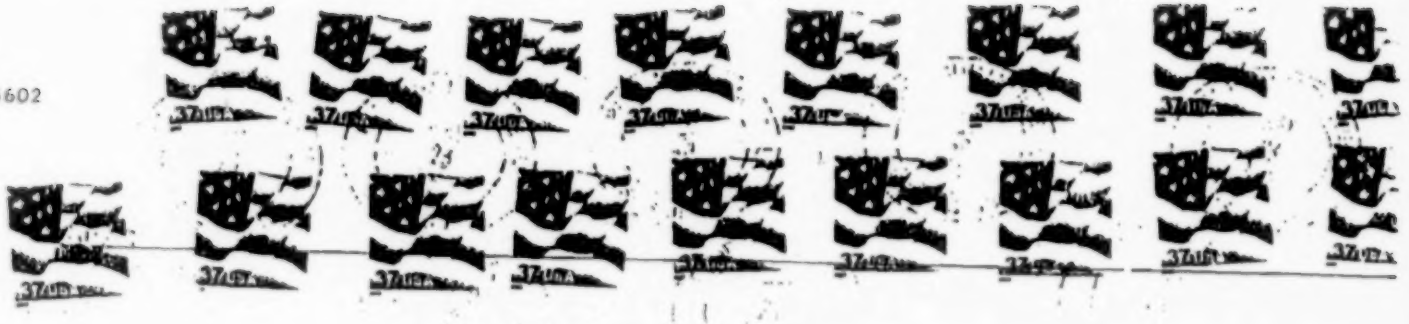
petition, and thus his appeal was frustrated through no fault of his own. This is not an attempt to 'shift ... blame,' but rather an objective recitation of the facts that resulted in Mr. Maples' failure to appeal the denial of his petition." *Id.* at 2.

***Maples v. Allen*, No. 07-15187-P, Petition for Rehearing and Rehearing En Banc (11th Cir. Dec. 15, 2009)**

- "The panel majority refused to recognize that *the State's* own failure 'to properly deliver' notice of the denial of Maples's Rule 32 petition—where the trial court clerk did nothing after receiving the unopened and unclaimed letters sent to Maples's lead counsel—itself constituted cause." *Id.* at 10.

3. The following are copies of the unopened and unclaimed envelopes addressed to Maples's *pro bono* attorneys of record (certified by the Clerk of the Circuit Court as "true and correct cop[ies]" on September 5, 2003, the date the copies were subsequently obtained from the clerk):

ORR
:LERK
:68
AL 35602



etwan to sender

~~CLARA INGEN-HOUSZ~~
~~125 BROAD STREET~~
~~NEW YORK, NY 10004-2498~~

Left Firm

ATTEMPTED NOT KNOWN

STATE OF ALABAMA MORGAN COUNTY
I, John Pat Orr, Clerk of Circuit C[illegible]
for said County and State, hereby certify [illegible]
the within and foregoing is a true and correct
copy as the same appears of record in this office.
Witness my hand this 5 day of Sept. 20 03

JOHN PAT ORR
CIRCUIT CLERK
P O BOX 668
DECATUR AL 35602

RETURNED TO SENDER
ATTEMPTED, UNKNOWN
( ) MOVED, UNABLE TO FORWARD
( ) INSUFFICIENT ADDRESS
( ) UNDELIVERABLE AS ADDRESSED
( ) MOVED, LEFT NO ADDRESS
( ) FORWARDING ORDER EXPIRED
( ) OUT OF BUSINESS
RTE. ____ CARR. INITS. ____

JAASI MUNANKA
125 BROAD STREET
NEW YORK, NY 10004-2498

CC

CC95-842.60

STATE OF ALABAMA MORGAN COUNTY
I, John Pat Orr, Clerk of Circuit Court for said County and State, hereby certify that the within and foregoing is a true and correct copy as the same appears of record in this office.

AMICUS CURIAE BRIEF

No. 10-63

AUG 11 2010

In The
Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI* ALABAMA APPELLATE COURT JUSTICES AND BAR PRESIDENTS IN SUPPORT OF PETITIONER

BERNARD E. HARCOURT
Julius Kreeger Professor of
Law and Criminology
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637
(773) 834-4068

LISA W. BORDEN*
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803
lborden@bakerdonelson.com

Counsel for Amici

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT REGARDING INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. NO "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED" RULE OR PRACTICE SUPPORTS THE DENIAL OF MAPLES' OUT-OF-TIME APPEAL 7

II. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT 14

A. Rule 32 Proceedings Are Difficult for Most Attorneys to Navigate, Let Alone Pro Se Petitioners; Lack of Both Counsel and Proper Notice Can Be Fatal 14

B. Maples was left unrepresented at a critical juncture 16

C. The State's Own Conduct Also Constituted Cause for Mr. Maples' Default 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Alverson v. State, 531 So. 2d 44 (Ala. Crim. App. 1988) 11

Barbour v. Allen, No. 06-10605 (May 10, 2007) 16, 17

Brooks v. State, 892 So. 2d 969 (Ala. Crim. App. 2002) 12

Curry v. United States, 507 F.3d 603 (7th Cir. 2007) 15

Dallas v. Haley, 228 F.Supp. 2d 1317 (M.D. Ala. 2002) 15

Douglas v. Alabama, 380 U.S. 415 (1965) 8

Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) 20

Ex parte Johnson, 806 So. 2d 1195 (Ala. 2001) 9, 12

Ex parte Miles, 841 So. 2d 242 (Ala. 2002) 9

Fountain v. State, 842 So. 2d 719 (Ala. Crim. App. 2000), *aff'd*, 842 So. 2d 746 (Ala. 2000) 9, 12, 13

Holland v. Florida, 2010 WL 2346549 18

Jamison v. Lockhart, 975 F.2d 1377 (8th Cir. 1992) 19

Jenkins v. State, 12 So.3d 166 (Ala. Crim. App. 2008) 14

Jones v. Flowers, 547 U.S. 220 (2006) 22

Lee v. Kemna, 534 U.S. 362 (2002) 8

Loggins v. State, 901 So. 2d 146 (Ala. Crim. App. 2005) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000) 18

Maples v. Allen, 586 F.3d 879 (11th Cir. 2009) 10

Marshall v. State, 884 So. 2d 900 (Ala. 2003) ... *passim*

Marshall v. State, 884 So. 2d 898 (Ala. Crim. App. 2002) ..... *passim*

Melson v. State, 902 So. 2d 715 (Ala. Crim. App. 2004) 11

Murray v. Giarratano, 492 U.S. 1 (1989) 16

Osborne v. Ohio, 495 U.S. 103 (1990) 8

Porter v. State, 2 S.W.3d 73 (Ark. 1999) 19

Puckett v. State, 834 So. 2d 676 (Miss. 2002) 19

Robinson v. State, 865 So. 2d 1250 (Ala. Crim. App. 2003) 10

Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (2004) 18

Shephard v. State, 598 So. 2d 39 (Ala. Crim. App. 1992) 11

Thompson v. State, 860 So. 2d 907 (Ala. Crim. App. 2002) 10

Williams v. State, 834 S.W.3d 464 (Tenn. 2001) 19

ALABAMA LEGISLATIVE HISTORY

H.B. 764, 2000 Leg., Reg. Sess. (Ala. 2000) 6

S.B. 18, 92, 2004 Leg., Reg. Sess. (Ala. 2004) 5

TABLE OF AUTHORITIES -- Continued

Page

S.B. 371, 2005 Leg., Reg. Sess. (Ala. 2005) 5

S.B. 29, H.B. 432, 2006 Leg., Reg. Sess. (Ala. 2006) 5

H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).....6

S.B. 125, H.B. 189, 2007 Leg., Reg. Sess. (Ala. 2007) 5

RULES

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6.....1

Ala. R. Crim. P. 1.2 9

Ala. R. Crim. P. 32 .....*passim*

Ala. R. Crim. P. 32.1(f) 8, 14

Ala. R. Crim. P. 32.2(c) 14

Ala. R. App. P. 4(b)(1) 8

OTHER

American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003), available at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf.....5

TABLE OF AUTHORITIES – Continued

Page

American Bar Association, ABA Death Penalty Representation Project 3 (2006) available at www.abanet.org/deathpenalty/docs/brochure 2006.pdf 20

Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Post-Conviction Proceedings*, 91 CORNELL L. REV. 1079, 1094 (2006) 16

Minutes of the Alabama State Bar Board of Commissioners Meeting, February 3, 2006, available at www.alabar.org/bbc/minutes/0203/bbc0203.pdf 6

Minutes of the Alabama State Bar Board of Commissioners Meeting, July 15, 2006, available at www.alabar.org/bbc/minutes/0606/AM2006_July15_2006.pdf 6

STATEMENT REGARDING INTEREST OF *AMICI*[1]

The *amici* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Ernest Hornsby is a former Chief Justice of the Alabama Supreme Court and a former President of the Alabama State Bar. Ralph Cook is a former Justice of the Alabama Supreme Court. William Bowen is a former Presiding Judge of the Alabama Court of Criminal Appeals. William Clark and Robert Segall have previously served as Presidents of the Alabama State Bar. In the positions in which they served, each has had an exceptional opportunity to observe, participate in, and be affected by the administration of Alabama's system of capital postconviction proceedings. The *amici* are perhaps better situated than any party in this litigation to inform this Court concerning the state of the capital postconviction litigation process in Alabama. As a result of their participation in the process, they have a compelling interest in urging the Court to grant the

---

[1] Pursuant to Rule 37.2(a), Sup. Ct. R., all parties were timely notified and have granted written consent for the filing of this Brief. Letters of consent are being submitted to the Clerk of Court contemporaneously herewith. Pursuant to Rule 37.6, Sup. Ct. R., the *amici* state that no person or entity, other than themselves and their counsel, authored any portion of this brief. The *amici* further state that no person or entity, other than themselves and their counsel, made any financial contribution toward the preparation and filing of this brief.

relief required to bring some measure of fairness to this procedure.

SUMMARY OF THE ARGUMENT

Alabama's capital punishment system is deeply flawed. Among the many dire failings of that system is its failure to adequately provide for competent counsel for indigent defendants charged with capital offenses, either at trial or on direct appeal. As a result of this and other failures, many of the convictions and sentences rendered by the process are inherently unreliable, and the proper functioning of the postconviction review process is therefore critical.

Unfortunately, Alabama's system of postconviction review in capital cases is exceedingly complex and rife with pitfalls – so much so that even attorneys and judges often must struggle to understand and comply with its procedures – and Alabama stands alone in failing to provide counsel for indigent death-sentenced inmates in postconviction proceedings. As a result, those who are fortunate enough to have attorneys must rely on pro bono counsel, most of whom practice far from Alabama. Although the *amici*, along with many others, have made numerous efforts to reform this system, it remains a labyrinth in which many a hapless inmate has become hopelessly lost, sometimes through no fault of his own.

In this case, the petitioner's crucial right to postconviction review has been unjustly extinguished. The

Eleventh Circuit's determination that there was a "firmly established and regularly followed" policy or practice of denying out-of-time appeals in circumstances such as these is clearly and fundamentally wrong. It is clear to us, contrary to the conclusion reached below, that the rules of procedure and the decisions of Alabama's appellate courts – extant at the time of Mr. Maples' effort to appeal and today – plainly show Alabama's "firmly established and regularly followed" practice, if any, is to *allow* such appeals. If Alabama's appellate decisions appear unsettled on this point, it is only with regard to the proper procedure to be followed in seeking an out-of-time appeal.

The petitioner here is the victim of a combination of circumstances that clearly establish sufficient cause for his default. While Mr. Maples was represented by pro bono counsel at the time his Rule 32 petition was filed, those attorneys both left their law firm and ceased representing Mr. Maples but failed to withdraw or notify the court of substitute counsel. When that event occurred, the petitioner became unrepresented, although he continued to believe that he was represented. When the order denying Mr. Maples' petition finally was issued, the law firm's mailroom returned the two copies it received unopened. The clerk of court took no further action, and Mr. Maples himself was not notified of the order until well after his time for appeal expired. Since Mr. Maples was unaware that he had been left unrepresented, he is without fault for the missed deadline.

ARGUMENT

Undersigned *amici*, in our former capacities as Justices of the Alabama Supreme Court and Alabama Court of Criminal Appeals, and Presidents of the Alabama State Bar, have had first-hand experience with the practice and procedures surrounding the administration of the death penalty in Alabama, and are in a unique position to be able to inform the United States Supreme Court of the state of that process in Alabama.

The complexities and pitfalls of the capital post-conviction process in Alabama cannot be overstated, nor can the importance of the proper functioning of that process, particularly as it applies to indigent defense. Alabama's system of providing for representation for indigent defendants during trial and direct appeals is deeply flawed. As a consequence of these problems, many of the verdicts and sentences rendered are inherently unreliable, and adequate post-conviction review is crucial.

One of the most glaring defects in Alabama's capital punishment system is the dearth of qualified counsel at all stages of the process. Over the course of decades, numerous efforts have been made to ensure that indigents sentenced to death receive the assistance of qualified counsel. The State Bar has made recommendations for the improvement of indigent

defense,[2] and numerous bills attempting to ensure counsel have been introduced in the Alabama legislature, many with our active support, but without success. Bills calling for a moratorium on executions, during which procedures would be implemented to ensure that the death penalty is administered fairly, were introduced without success during each of the last several years. *See, e.g.*, S.B. 18, 92, 2004 Leg., Reg. Sess. (Ala. 2004); S.B. 371, 2005 Leg., Reg. Sess. (Ala. 2005); S.B. 29, H.B. 432, 2006 Leg., Reg. Sess. (Ala. 2006); S.B. 125, H.B. 189, 2007 Leg., Reg. Sess. (Ala. 2007). If adopted, that legislation would have required, among other things, implementation of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[3] as well as additional due process protections in postconviction proceedings. *Id.*

Former Presidents of the Alabama State Bar and Judges of the State's appellate courts, including some of the *amici*, also have actively promoted legislation to provide appropriate representation for the indigent in postconviction litigation. House Bill 764, introduced in March 2000, would have created an "Office of the

---

[2] William Clark, one of the *amici*, was appointed to a State Bar advisory committee on indigent defense in 1975.

[3] *American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003) [hereinafter, "*ABA Guidelines*"], available at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf, visited August 9, 2010.

Alabama Appellate Defender," specifically to provide representation to the indigent in capital cases in which the death penalty had been imposed. H.B. 764, 2000 Leg., Reg. Sess. (Ala. 2000). It was never adopted. A later measure would have created an Indigent Defense Commission. Drafted by a task force appointed by then-Chief Justice Drayton Nabors and headed by Retired Associate Justice Gorman Houston,[4] it provided for the appointment of counsel for indigent persons in postconviction proceedings and established standards for the minimum experience, training, and qualifications of such counsel. The legislation was introduced in 2006 (S.B. 328. 2006 Leg., Reg. Sess. (Ala. 2006)), but failed to pass. *See, Minutes of the Alabama State Bar Board of Commissioners Meeting,* July 15, 2006, at 2,[5] *see also,* H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).

These are but a few examples of the many efforts that have been made to bring significant reform to Alabama's capital punishment processes. All such efforts have met with failure. Today most death-sentenced indigents who are fortunate enough to

---

[4] The task force consisted of four judges and nine lawyers, including representatives from the Alabama Attorney General's office, and criminal defense attorneys. *See, Minutes of the Alabama State Bar Board of Commissioners Meeting,* February 3, 2006, at 3-4 (available at www.alabar.org/bbc/minutes/0203/bbc 0203.pdf, visited August 9, 2010). William Clark, one of the *amici*, was a member of the task force.

[5] Available at www.alabar.org/bbc/minutes/0606/AM2006_ July15_2006.pdf, visited August 5, 2010.

have counsel in their postconviction proceedings are forced to rely upon volunteer lawyers, the vast majority of whom, like Mr. Maples' counsel, reside in states far from Alabama. Given the convoluted labyrinth of procedures through which the inmate must pass in these circumstances, and the severity of the consequences which he must suffer for any failure to do so correctly, two things, at least, are absolutely imperative: the inmate's counsel must not abandon their post, and the State must not play a game of "gotcha" with the inmate's life hanging in the balance.[6] In Mr. Maples' case, through no fault of his own, both of these events occurred, with deadly consequence.

I. No "Firmly Established and Regularly Followed" Rule or Practice Supports the Denial of Maples' Out-of-Time Appeal.

Adding to the overwhelming complexity of the postconviction rules as written is the fact that their

---

[6] The Attorney General's office contacted Mr. Maples directly *after* his time for appeal had expired and advised him that his petition had been dismissed and that his time to file a federal *habeas* petition would soon expire as well. App.253a. ("App." refers to the Appendix to the Petition for Writ of Certiorari submitted by the Petitioner in this case.) Although the State contended before the Alabama Supreme Court that Maples could "still present his postconviction claims" in federal court, App.18a., it then asserted to the federal court that Maples had defaulted on his claims of ineffective assistance of counsel due to his failure to file a timely appeal.

application in practice is often unsettled, at best. This Court has recognized that a state rule is "adequate" to bar federal review only when it is "firmly established and regularly followed" at the time the alleged default occurred. *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citations omitted). Adherence to this definition of adequacy is particularly imperative in the context of capital litigation, lest decisions that amount to life or death be made according to whim and without affording the death-sentenced inmate (or his counsel) notice of what the rules actually are and how they can be expected to be applied.

In determining whether a state procedural bar is "adequate" to evade federal review, one vital question that must be answered is "whether the state has put litigants on notice of the rule." *Lee*, 534 U.S. at 385-88; *Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965). Let us begin where anyone wanting to understand how to proceed might be expected to begin -- with a review of the written rules extant at the time Mr. Maples began his quest to appeal the dismissal of his Rule 32 petition. Alabama Rule of Appellate Procedure 4(b)(1) provided then, as it does now, that the time to appeal an adverse decision in a criminal matter is 42 days. Rule 32.1(f) of the Alabama Rules of Criminal Procedure provided, however, that a valid ground for relief was that "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). This carries out the purpose and intent of

Rule 1.2, Ala. R. Crim. P., which mandates that the rules "shall be construed to secure . . . fairness in administration, . . . and to protect the rights of individuals while preserving the public welfare."

The cases addressing out-of-time appeals in similar circumstances, while admittedly somewhat schizophrenic as to proper procedure, also would have led one to believe that an out-of-time appeal would, in one way or another, likely be granted. *See, Fountain v. State*, 842 So. 2d 719, 721-22 (Ala. Crim. App. 2000), *aff'd*, 842 So. 2d 746 (Ala. 2000), holding, in a case of first impression, that where the petitioner failed to receive notice of the denial of his Rule 32 petition through no fault of his own, "to deny [him] the opportunity to seek an out-of-time appeal . . . would be to deny [his] right to procedural due process and would not be a fair administration of justice." *See also, Ex parte Johnson*, 806 So. 2d 1195, 1197 (Ala. 2001) ("[w]e cannot deny Johnson his day in court simply because the trial court has not notified him of the disposition of his Rule 32 petition;" order denying petition vacated and trial court directed to issue new order and provide prompt notice); *Ex parte Miles*, 841 So. 2d 242, 244-45 (Ala. 2002) (where petitioner, through no fault of his own, did not receive timely notice of denial of Rule 32 petition, to not allow him opportunity to appeal "would violate his clear legal right to procedural due process."); *Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002), *overruled on other grounds*, 884 So. 2d 900 (Ala. 2003) ("we find that regarding his out-of-time appeal claim, Marshall

is entitled to the relief requested in his second Rule 32 petition");[1] *Thompson v. State*, 860 So. 2d 907, 908-09 (Ala. Crim. App. 2002) ("[b]etween the actions of his appointed counsel and the actions of the circuit clerk, Thompson found himself mired in a class 'Catch 22' situation;" trial court directed to enter a new order on petitioner's successive Rule 32 petition and give prompt notice); *Robinson v. State*, 865 So. 2d 1250, 1251 (Ala. Crim. App. 2003) (Where petitioner, through no fault of his own, did not receive order denying Rule 32 petition until after time for appeal expired, petitioner entitled to writ of mandamus requiring trial court to vacate denial, issue new order, and provide prompt notice). As the dissent below explained, *Marshall* alone establishes that out-of-time appeals were allowed in analogous circumstances. *Maples v. Allen*, 586 F.3d 879, 897 (11th Cir. 2009) (Barkett, C.J., dissenting).

What is clear to us, contrary to the conclusion drawn by the Eleventh Circuit Court of Appeals in this case, *Maples v. Allen, supra*, is that there was no "firmly established and regularly followed" rule or practice that would have compelled the denial of

---

[1] The decision of the Alabama Supreme Court in *Marshall*, which occurred only a few weeks after Mr. Maples learned that his petition had been denied, was not a determination by the Alabama Supreme Court that out-of-time appeals would be disfavored in such circumstances. Instead, the Alabama Supreme Court's decision in *Marshall* was meant to clarify the *procedure* through which such appeals must be sought. *See discussion infra* at 12-14.

Maples' out-of-time appeal. Indeed, it appears to us that the "regularly followed" practice at the time, if any could have been said to exist then or now, would have been to allow it.

The cases cited by the Eleventh Circuit panel in support of its conclusion that "Alabama's courts routinely have enforced the 42-day rule and denied out-of-time appeals" are simply inapplicable here. Only two of those cases had even been decided prior to Mr. Maples' attempt to appeal his case, and in each of them the courts found that the petitioners were not entitled to an out-of-time appeal for reasons that do not exist here. In *Shephard v. State*, 598 So. 2d 39 (Ala. Crim. App. 1992), the court held that, contrary to the petitioner's contention, he had been informed of his appellate rights. In *Alverson v. State*, 531 So. 2d 44 (Ala. Crim. App. 1988), the court rejected the petitioner's request for an out-of-time appeal because it found, after requiring an evidentiary hearing, that he had failed to show that he had notified his counsel of his wish to file an appeal or that the attorney had been negligent in any way. The later-decided case, *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004), is also inapposite. There, the court found that the petitioner failed to follow the procedures mandated by *Marshall, supra*, and had waived all of his other arguments asserted on appeal because he failed to present them to the circuit court. None of these cases have any factual or legal bearing on the matter at hand, and the decisions involving similar circumstances, decided both before and after Mr. Maples'

effort to appeal his case, consistently allow out-of-time appeals.

Well *after* Mr. Maples sought a writ of mandamus to allow his out-of-time appeal, the Alabama Court of Criminal Appeals again confirmed that the course chosen by Mr. Maples was the proper course for seeking such relief. The Court of Criminal Appeals itself found that the law concerning procedure for out-of-time appeals from the denial of Rule 32 petitions was "uncertain, to say the least." *Loggins v. State*, 901 So. 2d 146, 150 (Ala. Crim. App. 2005). In a special concurrence in *Loggins*, Judge Shaw discussed the history of the law applicable to out-of-time appeals in the Rule 32 context, prefacing his discussion with the recognition that "the law regarding the proper procedure for seeking an out-of-time appeal from the denial of a Rule 32, Ala. R. Crim. P., petition for postconviction relief has been in a state of confusion for the last five years." *Loggins*, 901 So. 2d at 151 (Shaw, J., concurring specially). Judge Shaw then recounted how Alabama's courts had variously opined during that time that the correct procedure for seeking an out-of-time appeal was through the filing of a successive petition, *Fountain v. State*, 842 So. 2d 719 (Ala. Crim. App. 2000), *aff'd*, 842 So. 2d 746 (Ala. 2001), or through a petition for writ of mandamus, *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001), or perhaps both, *Brooks v. State*, 892 So. 2d 969 (Ala. Crim. App. 2002), or perhaps not. *Marshall v. State*, 884 So. 2d 900 (Ala. 2003) (holding that mandamus was the sole avenue for seeking an out-of-time appeal in

Rule 32 proceedings). *See, Loggins,* 901 So. 2d at 151-52 (Shaw, J., concurring specially).

In January 2005, again reversing course on the procedural issue, the Alabama Supreme Court amended Rule 32.1(f) to expressly authorize a request for relief when "[t]he petitioner failed to appeal within the prescribed time *from the conviction or sentence itself or from the denial of a petition previously filed pursuant to this rule* and that failure was without fault on the petitioner's part."[6] (Emphasis added.) The Alabama Supreme Court also amended Rule 32.2(c) at the same time, providing for a six-month limitation period on the filing of a Rule 32 petition seeking an out-of-time appeal from the denial of a previous Rule 32 petition. *See, Loggins,* 901 So. 2d at 152 (Shaw, J., concurring specially).

A single consistent thread runs throughout the otherwise erratic history of the law concerning out-of-time appeals from Rule 32 petitions in circumstances such as those of Mr. Maples. From *Fountain,* decided before Mr. Maples sought to appeal his case in 2003,

---

[6] Loggins himself became caught in the machinery, not having complied with the process of the moment. However, in his concurrence, Justice Shaw noted that even though the then-pending appeal had to be dismissed for lack of jurisdiction, Loggins could start over and could "obtain an out of time appeal under the authority of *Marshall* and its progeny," even though those cases were considered "doctrinally unsound" with respect to the procedure to be followed. *See, Loggins,* 901 So. 2d at 153-54 (Shaw, J., concurring specially).

to *Marshall*, decided that same year, to today's Rule 32.1(f) and 32.2(c), amended in 2005 – all of these decisions and amendments to the rules were designed, if not altogether successfully, to clarify how the courts were to *allow* out-of-time appeals by hapless inmates whose fates and, in cases such as Mr. Maples', whose very lives have been endangered by a default that was not their fault. As recently as December 2008, with the procedural confusion apparently finally resolved, the Alabama Court of Criminal Appeals held in *Jenkins v. State*, 12 So.3d 166 (Ala. Crim. App. 2008), that a petitioner who had shown that he was not served with an order denying his Rule 32 petition was entitled to relief on his second Rule 32 petition, in which he sought to be granted an out-of-time appeal. *Id.* at 166. The notion that Alabama's courts would regularly follow a practice of denying such out-of-time appeals is clearly and fundamentally wrong.

II. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT.

A. Rule 32 Proceedings Are Difficult for Most Attorneys to Navigate, Let Alone Pro Se Petitioners; Lack of Both Counsel and Proper Notice Can Be Fatal.

Alabama's postconviction process is, in general, governed by exceptionally complex procedural rules, including many unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate the maze. These rules are so

complex, and often so unyielding, that an inmate who is not being represented by competent counsel has little chance of survival. In addition, "[f]ederal post-conviction law is complex, and few prisoners understand it well." *Curry v. United States*, 507 F.3d 603, 604 (7th Cir. 2007).

The fact is that the death penalty postconviction litigation process is so complex that even attorneys and judges often struggle to understand its nuances, and the inability of an unrepresented inmate to comply with procedural requirements can surely result in potentially meritorious claims being barred. *See, e.g., Dallas v. Haley*, 228 F.Supp. 2d 1317, 1320 (M.D. Ala. 2002) ("[S]uffice it to say that the issue of whether Dallas' habeas petition was timely filed is a very complex question which turns on whether a certain Alabama procedural rule was firmly established and regularly followed. As mentioned above, this issue is complicated enough that the magistrate judge asked the parties to rebrief it").

Where, as here, the petitioner, through no fault of his own, suffers a complete failure of representation and does not receive notice of an order to be appealed, he is rendered completely unable to comply with the deadline for appeal. It is undisputed that Mr. Maples was not notified by anyone, neither his *former* counsel, the State, or the court, that his Rule 32 petition had been denied until after the time for appeal had expired. Since Mr. Maples quite understandably believed that his counsel would receive notice of any order and would notify him of that occurrence, he

could not be expected to try to personally monitor the status of his case. That is an arduous task, at best, for the incarcerated, but at least those who know they have no attorney are aware that they must undertake it. Under these circumstances, Mr. Maples cannot be held responsible for his failure to appeal an order of which he had no knowledge.

B. Maples was left unrepresented at a critical juncture.

Since this Court's decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), there has been a "virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings."[9] Most states' legislatures have recognized the critical role that postconviction counsel serve in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners as a matter of right, leaving indigent inmates to either fare for themselves or to rely upon the volunteer assistance of pro bono counsel in those increasingly rare instances when pro bono assistance is available.

As the State of Alabama noted in its brief to this Court in *Barbour v. Allen*, most of the lawyers providing pro bono assistance to indigent death-sentenced inmates in Alabama are operating at a significant

---

[9] Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 CORNELL L. REV. 1079, 1094 (2006).

distance, most often practicing in large law firms located in major northeastern cities. Br. in Opp. at 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). We certainly applaud and appreciate the noble efforts of the many out-of-state attorneys who, over the years, have stepped into the regrettable void. It is thus neither surprising nor unusual that Mr. Maples placed his fate in the hands of pro bono counsel from another state. The attorneys who agreed to represent Mr. Maples on a pro bono basis practiced at Sullivan & Cromwell in New York, N.Y.[10] However noble their intentions, perhaps it was this remove, both physical and psychological, that somehow allowed Mr. Maples' pro bono counsel to simply walk away to other pursuits without notice to anyone concerned. Regardless of their reasons, Mr. Maples was left in the seemingly secure but terribly mistaken knowledge that he had the representation of competent counsel, when in fact he had no representation at all.

The two attorneys who had represented Mr. Maples also engaged an Alabama attorney, John Butler, to act as local counsel for the sole purpose of having them admitted *pro hac vice*, but Mr. Butler has made it clear that he never intended to provide any representation to Mr. Maples. App.255a-56a. This is not uncommon. While Alabama formally requires local counsel to "accept joint and several responsibility with

---

[10] Pursuant to Sullivan and Cromwell's policy, the two attorneys represented Mr. Maples solely in their individual capacities, and did not use the firm's name in appearing or filing pleadings on Mr. Maples' behalf. App.257a.

the foreign attorney" to provide representation, it is an unfortunate fact of Alabama practice – certainly unknown to and not the fault of Mr. Maples – that trial courts have rarely enforced this rule. The fact is that local counsel for out-of-state attorneys in postconviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted, and Alabama's trial courts do not regularly require them to do more.

The errors of counsel generally do not form the basis of cause for a default in the postconviction context, so long as counsel remains the inmate's agent. But this Court has rightly recognized that counsel's abandonment of a client rises to a level of significance much greater than simple negligence, and must sever the inmate's responsibility for counsel's conduct. As Justice Alito explained in his concurrence in *Holland v. Florida*, 2010 WL 2346549 at *18 (Alito, J., concurring in part and concurring in the judgment), "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."

Numerous federal and state courts have recognized that when a client has been abandoned by his counsel, the client cannot be held responsible for the consequences of that abandonment. *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (2004) (procedural default caused by counsel's "utter abandonment" of petitioner "constituted extraordinary circumstances external to the party's conduct" and established cause.); *Manning*

v. Foster, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors are not attributable to client when attorney "does not actually represent the client."); *Jamison v. Lockhart,* 975 F.2d 1377, 1380 (8th Cir. 1992) (attorney's conflict of interest would constitute external cause for default because attorney would have "effectively ceased to be [the client's] agent"); *Puckett v. State,* 834 So. 2d 676, 681 (Miss. 2002) (out-of-time appeal allowed where "actions of former counsel were such as to rise to the deprivation of fundamental due process"). The Supreme Courts of Arkansas and Tennessee, each addressing circumstances in which the petitioners believed they were being represented by counsel but were not, have recognized the fundamental unfairness of saddling the abandoned client with the sins of his counsel. *Porter v. State,* 2 S.W.3d 73, 74 (Ark. 1999) (finding cause to excuse petitioner's procedural default where attorney ceased representation but failed to withdraw, and recognizing fundamental unfairness of requiring "inmate on death row to abide by the stringent filing deadlines when he was under the impression he was represented by counsel"); *Williams v. State,* 834 S.W.3d 464, 469 (Tenn. 2001) ("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing certain remedies independently").

Even those inmates who *know* they are proceeding *pro se* have little hope in our byzantine system. "Without a lawyer, these indigent defendants have no realistic chance of challenging their convictions and death sentences, even though obvious and

profound errors may have occurred during trial."[11] *See, e.g.*, *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005) ("Because most Rule 32 petitioners file their petitions without the assistance of legal counsel, they could encounter serious problems if the relation-back doctrine was applied to Rule 32 proceedings"). Having been left unrepresented without notice, Mr. Maples does not have a prayer. It is simply unacceptable to us that the State should be allowed to maintain a system in which the last hope of the condemned can be snatched away, though they are without fault, leaving them with no recourse.

C. The State's Own Conduct Also Constituted Cause for Mr. Maples' Default.

At some point before the denial of his Rule 32 petition on May 22, 2003, Mr. Maples became unrepresented, but received no notice of that fact. His attorneys left the firm of Sullivan & Cromwell, and failed to withdraw or to notify the court of substitute counsel. Once he had no attorneys representing him, Mr. Maples was helpless – particularly because he was not only unrepresented, but he did not know it. Any inmate proceeding pro se in postconviction litigation is at dire risk of not receiving vital notice of developments in his case. In his dissent in *Marshall*

---

[11] *American Bar Association, ABA Death Penalty Representation Project* 3 (2006), available at www.abanet.org/deathpenalty/docs/brochure2006.pdf, visited August 9, 2010.

v. State, arguing that the Alabama court should have simply treated Marshall's successive Rule 32 petition as a petition for writ of mandamus rather than requiring him to begin anew, Justice Johnstone noted:

> "The big problem pertinent to the issue addressed by the main opinion is that, commonly in this state, a trial court will deny a convict's Rule 32, Ala. R. Crim. P., petition but will not notify the convict of the denial and the convict will not receive word of the denial until after his time to appeal the denial has expired. The convict typically cannot know when to expect a ruling, since trial judges sometimes deny such petitions immediately upon receipt, sometimes withhold rulings for weeks, months, or years, sometimes conduct hearings before ruling, and sometimes deny the petitions without a hearing. For all of the sanctimonious talk of the courts about a petitioner's duty to monitor the status of his Rule 32 petition, any notion that each of these poor devils can periodically obtain reliable information on whether the trial court has ruled, is stark fiction. If the convict is incarcerated, he is even more helpless to learn of any ruling."

Marshall v. State, 884 So. 2d 900, 905-06 (Ala. 2003) (Johnstone, J., dissenting).

In Mr. Maples' case, the typical inability of an incarcerated petitioner to obtain timely and accurate information was compounded by the fact that he wrongly believed he was still represented by counsel.

Although Mr. Maples had no way of knowing that his counsel had not received the trial court's order and were no longer representing him until he was contacted by the Attorney General's office in August 2003,[12] the circuit court clerk's office learned much earlier that something was amiss. The orders the clerk's office had mailed to Mr. Maples' attorneys in New York were returned to the clerk, stamped with notices that they were being returned because the recipients were not known. Even a cursory review of the court file would have revealed that no other attorney was participating in the case, but the court clerk took no further action to ensure that Mr. Maples received notice of the order dismissing all of his claims.

In *Jones v. Flowers*, 547 U.S. 220, 238 (2006), a case involving a tax sale of the petitioner's home, the official notice to the petitioner was returned because he had moved to a different address. In finding the State's notice insufficient, this Court noted that "someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned

---

[12] For whatever reason, the State saw fit to contact Mr. Maples directly to let him know of his deadline for filing a federal *habeas* petition, but apparently saw no purpose in contacting him earlier, while he still had time to file a notice of appeal. One wonders why the State bothered to notify Mr. Maples of the latter deadline, since it would then argue that all of his claims were precluded by his failure to appeal in state court.

unclaimed, and there was more that reasonably could have been done." In the case of Mr. Maples, there was certainly no doubt about where to find him. It would have been a simple matter for the clerk to mail a copy of the order to him directly. Where the stakes were not a home, but a life, clearly "there was more that reasonably could have," and should have, been done.

CONCLUSION

For these reasons, we urge the United States Supreme Court to grant the petition for writ of certiorari.

Respectfully submitted,

BERNARD E. HARCOURT
Julius Kreeger Professor of
Law and Criminology
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637
(773) 834-4068

LISA W. BORDEN
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803

Counsel for Amici

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 10 2010
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN,
Commissioner, Alabama Department
of Corrections,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Wayne Morse, Jr.
Counsel of Record
Susan J. Walker
Waldrep Stewart
& Kendrick, LLC
2323 Second Ave. N
Birmingham, AL 35203
(205) 254-3216
morse@wskllc.com

Christine A. Freeman
817 South Court Street
Montgomery, AL 36103

Attorneys for *Amicus Curiae*

August 10, 2010

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. **Alabama Law At The Time Of Maples's Default Established His Right To An Out-of-Time Appeal Under Rule 32.1(f)** 3

II. **The Failings Of Alabama's Post-Conviction System Contributed To Maples's Procedural Default And Will be Exacerbated By The Decision Below** 12

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Federal Cases

Card v. Duggar,
911 F.2d 1494 (11th Cir. 1990) 2

Ford v. Georgia,
498 U.S. 411 (1991) 2,3,12

Harris v. Reed,
489 U.S. 255 (1989) 2

Holland v. Florida,
560 U.S. ____, U.S. Lexis 4946 (2010) 11

James v. Gibson,
228 F.3d 1217 (10th Cir. 2000), *cert. denied*,
533 U.S. 933 (2001) 8

Lee v. Kemna,
534 U.S. 362 (2002) 3,7,11

Maples v. Allen,
586 F.3d 879 (11th Cir. 2009) 4,9,12

Pearson v. Norris,
52 F.3d 740 (8th Cir. 1995) 8

Spencer v. Zant,
715 F.2d 1562 (11th Cir. 1983) 10

Wainwright v. Sykes,
433 U.S. 72 (1977) 2

State Cases

Alverson v. State,
531 So. 2d 44 (Ala. Crim. App. 1988).....11,12

Brooks v. State,
892 So. 2d 969 (Ala. Crim. App. 2002).....5,6

Easterling v. State,
854 So. 2d 142 (Ala. Crim. App. 2002).....5

Ex Parte Brooks,
892 So. 2d 976 (Ala. 2004).....5,8

Ex parte Fountain,
842 So. 2d 726 (Ala. 2001).....4,6,8

Ex parte Jenkins
972 So. 2d 159 (Ala. 2005).....16

Ex parte Johnson,
806 So. 2d 1195 (Ala. 2001).....5

Ex parte Maples,
885 So. 2d 845 (Ala. Crim. App. 2004).....3,4,11

Ex parte Miles,
841 So. 2d 242 (Ala. 2002).....5

Ex parte Robinson,
865 So. 2d 1250 (Ala. Crim. App. 2003).....5

Ex parte Weeks,
611 So. 2d 259 (Ala. 1992).....7

Flowers v. State,
No. CC-97-20.60 (Montgomery Co. 2003).....16

Fountain v. State,
842 So. 2d 719 (Ala. Crim. App. 2000).....4,5,7

King v. State,
881 So. 2d 542 (Ala. Crim. App. 2002).....5

Marshall v. State,
884 So. 2d 898 (Ala. Crim. App. 2002).... 5,8-10

Marshall v. State,
884 So. 2d 900 (Ala. 2003).....7,8

Melson v. Allen,
Ms. 09-5373, 2010 U.S. LEXIS 5124 (2010)..11

Melson v. State,
902 So. 2d 715 (Ala. Crim. App. 2004).....11

Palmer v. State,
842 So. 2d 751 (Ala. Crim. App. 2002).....5

Shepard v. State,
598 So. 2d 39 (Ala. Crim. App. 1992).....11,12

Smith v. State,
No. CC-98-2064.60 (Mobile Co. 2002).....17

Thompson v. State,
860 So. 2d 907 (Ala. Crim. App. 2002).....6

STATUES AND RULES

Ala. Code § 15-12-1(5) (1975) 13,14

Ala. Code § 15-12-2 (1975) 13

Ala. Code § 15-12-3 (1975) 14

Ala. Code § 15-12-21(d) (1975) 15

Ala. Code § 15-12-23 (1975) 14,15

Rule 32, Ala. R. Crim. P. ..... *in passim*

Rule 32.1, Ala. R. Crim. P. ..... *in passim*

OTHER AUTHORITY

American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, (June 2006) 14

Pamela H. Bucy, The VLP and the Thief, 71 Alabama Lawyer 45 (January 2010) 17

Celestine Richards McConville, The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Post-conviction Counsel, 42 Tulsa L.Rev. 253 (Winter 2006) 17,19

Robin M. Maher, The ABA and the Supplementary Guidelines for the Mitigation

Function of Defense Teams in Death Penalty Cases, 36 Hofstra Law Review 763 (Spring 2008) 19

Elisabeth Semel, The Lone Star State Is Not Alone In Denying Due Process To Those Who Face Execution, 23 The Champion 28 (July 1999) .. 18

Bryan Stevenson, Symposium: Pro Se Litigation Ten Years After AEDPA. 41 Harvard Civil Rights - Civil Liberties Law Review 339 (Summer 2006) 16

Ron Tabak, The Private Bar's Efforts To Secure Proper Representation For Those Facing Execution, 29 Justice System Journal 356 (2008) 19

Joseph P. Van Heest, Rights of Indigent Defendants in Criminal Cases after Alabama v. Shelton, Alabama Lawyer (November 2002) 15

18 Hastings Constitutional Law Quarterly 211, citing Wilson & Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 Judicature 331 (1989) 20

Hannah Jacobs Wiseman, Pro Bono Publico: The Growing Need for Expert Aid, 60 S. C. L. Rev. 493 (Winter 2008) 20

INTEREST OF *AMICUS CURIAE*

The Alabama Criminal Defense Lawyers Association[1] is a non-profit association for criminal defense attorneys, through which criminal defense lawyers express their positions on legislation, court reform, cases affecting rights of defendants, and other matters affecting criminal justice in Alabama. The organization seeks to promote administration of justice and ensure that Courts enforce maximum lawful access to justice by the criminally accused or convicted.

This organization is interested in the instant case because the Eleventh Circuit has denied access to federal constitutional review to Cory Maples and potentially others in his same circumstances: indigent Alabama Death Row prisoners who, through no fault of their own, relied on volunteer attorneys who missed court or appeal deadlines. The Eleventh Circuit's decision will also have a chilling effect on counsel who volunteer to represent Alabama Death Row prisoners in capital post-conviction litigation. Alabama does not have a state-funded post-conviction litigation program and limits reimbursement for court-appointed post-conviction counsel to $1,000. As a result, Alabama Death Row prisoners rely primarily on volunteer counsel to vindicate their federal constitutional rights.

---

[1] The parties consented in writing to the filing of this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of the brief. Attorneys for *Amicus Curiae* notified counsel of record for the parties 10 days prior to the due date for filing briefs.

SUMMARY OF ARGUMENT

The divided Eleventh Circuit panel decision below is fundamentally inconsistent with this Court's precedents on the adequacy of State law rules and warrants this Court's review. Alabama courts by no means have "routinely" denied untimely appeals in situations similar to Maples's. To the contrary, at the time of Maples's procedural default, Alabama courts were consistently *permitting* out-of-time appeals when a petitioner established that the reason for missing the appellate deadline was "through no fault of his own" and were also permissively interpreting Rule 32.1(f), Ala. R. Crim. P., and its precedential precursors to permit out-of-time appeals in wide-ranging circumstances. The Eleventh Circuit's decision enforcing a procedural default in these circumstances exacerbates the fundamental flaws in what is already perhaps the nation's most troubled capital punishment system.

ARGUMENT

A federal court owes no deference to a state's procedural default ruling unless it rests upon *adequate* state procedural grounds. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (emphasis added); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989). Adequacy requires that a state procedural rule "be firmly established and regularly followed; that is, not applied in an arbitrary or unprecedented fashion." *Card v. Duggar*, 911 F.2d 1494, 1516 (11th Cir. 1990); *see also Ford v. Georgia*, 498 U.S. 411, 425 (1991). A state procedural rule must be adequate when the purported procedural default

occurred. *Ford*, 498 U.S. at 424. The Eleventh Circuit mis-applied this principle and failed to undertake a searching review of Alabama's application of Rule 32.1(f), before deciding that the rule was firmly established and regularly followed at the time of procedural default and that it had not been arbitrarily applied to Maples. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002) (adequacy of state procedural rule is federal law question).

I. Alabama Law At The Time Of Maples's Default Established His Right To An Out-of-Time Appeal Under Rule 32.1(f).

Maples did not receive notice from his court-appointed attorneys or the court when the circuit court denied his Rule 32 petition. Consequently, Maples was denied the opportunity to appeal the dismissal of his Rule 32 petition when, through no fault attributable to him, Maples's appointed counsel missed the appeal deadline.

In May 2003, the time of the procedural default, Rule 32.1(f) permitted petitioners to file out-of-time appeals "where the petitioner failed to appeal within the time prescribed and that failure was without fault on the petitioner's part." Pursuant to Rule 32.1(f), Maples's counsel sought leave to file an out-of-time appeal, filing a petition for writ of mandamus to the Alabama Court of Criminal Appeals. Despite entitlement to relief under the Rule's plain language and prior state practice granting similar out-of-time appeals, Alabama appellate courts arbitrarily foreclosed Maples's use of Rule 32.1(f). *Ex parte Maples*, 885 So. 2d 845, 847

(Ala. Crim. App. 2004); *Ex parte Maples*, 920 So. 2d 1138 (Ala. 2004) (table).

The Eleventh Circuit erroneously found that Rule 32.1(f) was not arbitrarily applied in the denial of Maples's untimely post-conviction appeal and wrongly concluded that Alabama courts have "routinely" denied untimely post-conviction appeals. *Maples v. Allen*, 586 F.3d 879, 888-89 (11th Cir. 2009).

In May 2003, Alabama courts did not "routinely" deny untimely appeals in situations similar to Maples. Rather, in May 2003, Alabama courts were consistently *permitting* out-of-time appeals when a petitioner established that the reason for missing the appellate deadline was "through no fault of his own," and also permissively *interpreting* Rule 32.1(f) and its precedential precursors to include out-of-time appeals under a wide variety of circumstances. State law extant in May 2003 demonstrates that Maples's case is analogous to those previously found to have *warranted* granting of an out-of-time appeal.

In *Fountain v. State*, 842 So. 2d 719 (Ala. Crim. App. 2002), *rev'd in part* on other grounds, *Ex parte Fountain*, 842 So. 2d 726 (Ala. 2002), the Alabama Court of Criminal Appeals first recognized that a Rule 32 petitioner has the "right to petition a circuit court for an out-of-time appeal pursuant to Rule 32.1(f), ... when the petitioner has been denied the ability to file a timely appeal because of a mistake by the circuit court." The Court of Criminal Appeals affirmed the circuit court's grant of an out-of-time appeal, because Fountain alleged that he had not received notice of the dismissal of his Rule 32 petition. The Court noted "... Alabama appellate

courts have interpreted the Alabama Rules of Criminal Procedure in such a way as to protect the rights of individuals and to assure fairness in the administration of our judicial process." 842 So. 2d at 722.

In *Ex parte Johnson*, 806 So. 2d 1195, 1196 (Ala. 2001), petitioner alleged he missed the deadline for appealing the denial of his Rule 32 petition because, in spite of repeated inquiries to the clerk of court, the circuit court never notified him about the disposition of his Rule 32 petition. Asserting due process grounds, the petitioner sought and was granted a writ of mandamus directing the circuit court to provide notice of the disposition of his Rule 32 petition. Without disturbing the Alabama Court of Criminal Appeals' opinion in *Fountain*, the Alabama Supreme Court granted Johnson an out-of-time appeal from the denial of his Rule 32 petition. The Court attributed fault for petitioner's inability to perfect a timely appeal to the circuit court, which had failed to give petitioner adequate notice of its ruling.

In *Brooks v. State*, 892 So. 2d 969 (Ala. Crim. App. 2002),[2] the Court of Criminal Appeals relied upon the newly announced decisions in *Ex parte Fountain*, *supra*, and *Ex parte Johnson*, *supra*, to

---

[2] *Ex Parte Brooks*, 892 So. 2d 976 (Ala. 2004) (reversing based on holding in *Marshall* that mandamus is sole remedy for out-of-time appeal of Rule 32 petition dismissal); *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Ex parte Robinson*, 865 So. 2d 1250 (Ala. Crim. App. 2003); *King v. State*, 881 So. 2d 542 (Ala. Crim. App. 2002); *Easterling v. State*, 854 So. 2d 142 (Ala. Crim. App. 2002); and, *Palmer v. State*, 842 So. 2d 751 (Ala. Crim. App. 2002).

justify its conclusion that petitioner was entitled to an out-of-time appeal from the dismissal of his Rule 32 petition if, on remand, the circuit court concluded (1) Brooks never received notice of the circuit court's order denying his Rule 32 petition, or (2) the 42-day period for filing a notice of appeal had run before Brooks received his copy of the order.

In *Thompson v. State*, 860 So. 2d 907, 910 (Ala. Crim. App. 2002), petitioner filed a second Rule 32 petition pursuant to Rule 32.1(f), seeking an out-of-time appeal after missing the deadline to appeal the denial of his first Rule 32 petition. He alleged his appointed counsel failed to file a notice of appeal and had been unresponsive to his requests for information about the status of the appeal, and that the circuit clerk had rebuffed his efforts to file a *pro se* appeal. Relying on *Ex parte Fountain, supra*, and *Brooks v. State, supra*, the Court of Criminal Appeals reversed the circuit court's denial of Thompson's second Rule 32 petition. The court granted relief and attributed fault to both "the actions of his appointed counsel and the actions of the circuit clerk." *Thompson*, 860 So. 2d at 910. On remand, the court directed the circuit court to permit petitioner to file an appeal.

Prior to 2003, Alabama courts also routinely granted out-of-time appeals where a *pro se* petitioner showed his failure to perfect a collateral appeal resulted from a defective or absent court notice. Thus Alabama courts had interpreted the "without fault on the petitioner's part" language in Rule 32.1(f) to include situations where a *pro se* petitioner had not received notice of a case dismissal in time to perfect a notice of appeal. Nothing in the terms of Rule 32.1(f) suggests that the same results

would not follow where a petitioner was represented by counsel. And none of these cases suggested that an appeal would not be allowed where the petitioner was without fault because of a clerk's failure to notify petitioner of the dismissal of his Rule 32 petition or because of his attorney's abandonment. *Compare Lee v. Kemna*, 534 U.S. 362, 387 (2002) (stating rule was inadequate because "no published Missouri decision demands unmodified application of the Rules in the urgent situation Lee's case presented").

Until the amendment of Rule 32.1, effective June 1, 2005, a persistent lack of clarity in Alabama appellate opinions existed regarding the proper *mechanism* for pursuing such relief, whether a writ of mandamus or successive Rule 32 petition was required—which clouded the proper application of Rule 32.1 generally. During the period relevant to Maples's appeal from the denial of his Rule 32 petition, two methods for appealing out-of-time were in effect.[3] The Alabama Court of Criminal Appeals'

---

[3] In *Fountain, supra*, the Alabama Court of Criminal Appeals instructed the petitioner to file a successive Rule 32 petition to obtain permission to appeal out-of-time, where his failure to appeal resulted from lack of notice that his petition had been denied. The Court of Criminal Appeals opined that this situation fell within the penumbra scope of Rule 32.1(f), which at that time did not include a provision for appealing out-of-time from the dismissal or denial of a Rule 32 petition.

However, decisions of the Alabama Supreme Court directed litigants to petition for writ of mandamus, which requires absence of other available remedy. *Brooks supra*; *Marshall v. State*, 884 So. 2d 900 (Ala. 2003); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Ex parte Weeks*, 611 So. 2d 259 (Ala. 1992). The Alabama Supreme Court's decision in *Marshall, supra*, in September 2003, only directed that

broader construction of Rule 32.1(f) was validated by the Alabama Supreme Court's 2005 revision of that Rule, which included out-of-time appeals in Rule 32 proceedings. *See* Rule 32.1. Note from the Reporter of Decisions, re: revision of Rule 32.1(f) on June 1, 2005. The 2005 revision clarified the proper procedure to follow, but affirmed that out-of-time appeals are permitted for petitioners such as Maples.

In May 2003, case law would have indicated to Rule 32 petitioners that out-of-time appeals were authorized if petitioner could establish (1) failure to perfect an appeal within the time prescribed and (2) that such failure to timely appeal was not petitioner's fault. *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002), is directly on point.

As the dissenting opinion below explains, in *Marshall* the Alabama Court of Criminal Appeals allowed an out-of-time appeal from the denial of a Rule 32 petition, based on facts indistinguishable from those presented in Maples's case. In *Marshall*, relying on *Ex parte Fountain, supra* and *Ex parte Brooks, supra*, the court held the State's failure to serve a Rule 32 petitioner with a copy of the order denying relief violated due process, entitling him to an out-of-time appeal.

---

mandamus was the proper method of seeking Rule 32.1(f) relief. It did not disturb the substance of the lower court's holding that Marshall was entitled to file an out-of-time appeal. The Alabama Supreme Court's decision could not pose an impediment to Maples, because that decision post-dated his filing of the out-of-time appeal. *See, e.g., James v. Gibson*, 228 F.3d 1217, 1226-27 (10th Cir. 2000), *cert. denied*, 533 U.S. 933 (2001); *Pearson v. Norris*, 52 F.3d 740, 742 (8th Cir. 1995).

Claims of the *Marshall* petitioner are nearly identical to those of Maples: "Marshall claimed that he was due an out-of-time appeal, because, through no fault of his own, he had never received notice of the circuit court's dismissal of his first Rule 32 petition. Specifically, he contends that he did not receive a copy of the dismissal order because the circuit court did not send him a copy, and because his counsel rendered ineffective assistance by failing to inform him that his first Rule 32 petition had been dismissed." *Id.*, 884 So. 2d at 898-99. Other material similarities exist, as Judge Barkett's dissent points out, including that "[l]ike Maples, Marshall did not begin filing his requests with the clerk until after the order denying his Rule 32 petition had been decided" and that both petitioners had Rule 32 counsel who failed to perfect appellate notice *after* having received notice of the denials. *Maples*, 586 F.3d at 896 (Barkett, J., dissenting) (emphasis in original). When Maples pursued the out-of-time-appeal in 2003, he was subject to application of Rule 32.1(f), exactly as articulated in *Marshall* the prior year.

Despite the overwhelming factual similarities between this case and *Marshall*, *supra*, the Eleventh Circuit found the *Marshall* opinion distinguishable from Maples's case, and therefore not capable of establishing that Rule 32.1(f) had been inconsistently applied. The Court speculated, with scant factual or legal bases, that *Marshall* would not permit an out-of-time appeal unless a court clerk assumed a duty to effect personal service on the petitioner. *Maples*, 586 F.3d at 889 (Alabama appellate courts "appeared to find that the state circuit clerk assumed a duty to serve Marshall

personally in prison").[4] The "duty" presumably arose when Marshall directed repeated inquiries to the clerk about the status of his case. This restrictive reading of *Marshall* is inconsistent with that opinion and with prior Alabama precedent which had supported a more expansive interpretation of Rule 32.1(f).

The Eleventh Circuit's unfounded interpretation of *Marshall*, which was controlling authority at the time Maples's procedural default occurred, is also antithetical to a proper adequacy analysis. The ruling in *Marshall* was consistent with the prior precedent discussed above, and Maples was justified in his reliance upon it when he pursued an out-of-time appeal. Nothing in *Marshall* or in prior cases would have led Maples to understand that he was not entitled to pursue an out-of-time appeal, via mandamus, after having failed timely to perfect the notice of appeal from the denial of his Rule 32 petition. Nor does *Marshall* in any way suggest that pursuing an out-of-time appeal is contingent upon a finding that a court official assumed some special responsibility for notification. In any event, the Eleventh Circuit overlooked the

---

[4] The majority's speculation is contrary to a proper adequacy analysis of state procedural rules. Respectfully, principles of comity and federalism, which animate procedural default doctrine, do not permit either uncritical acceptance or over-exuberant interpretation of state procedural rules. *See, e.g., Spencer v. Zant*, 715 F.2d 1562, 1573 (11th Cir. 1983)("Thus, it is reasonable to conclude that Georgia's novel application of its procedural rule to Spencer, although not directly contrary to precedent, was not adequately supported by precedent so as to apprise Spencer at trial that the second or third day of voir dire was too late to raise his claim.").

Court of Criminal Appeals' holding that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition." *Ex parte Maples*, 885 So. 2d at 849. Thus, even using the Eleventh Circuit's unduly restrictive reading of state law, Maples was entitled to an out-of-time appeal. Inexplicably, Marshall received the benefit of an out-of-time appeal but Maples did not.

None of the three cases upon which the panel majority's opinion rests support its contrary conclusion that Alabama court's "routinely" denied out-of-time appeals in May 2003.[5] Two of the cases cited, *Shepard v. State*, 598 So. 2d 39 (Ala. Crim. App. 1992), and *Alverson v. State*, 531 So. 2d 44 (Ala. Crim. App. 1988), are distinguishable because they involve situations where the courts found petitioner at fault for failing to perfect his appeal.[6] Here, all

---

[5] *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004), is relevant to the extent that this Court granted Melson a writ of certiorari, vacated the judgment and remanded the case to the Eleventh Circuit for consideration of decision in *Holland v. Florida*, 560 U.S. ___, 2010 U.S. LEXIS 4946 (2010). *Melson v. Allen*, [Ms. 09-5373, June 21, 2010] ___ U.S. ___, 2010 U.S. LEXIS 5124 (2010).

[6] The Eleventh Circuit's approach, relying on distinguishable cases to establish adequacy is directly at odds with this Court's precedents. *See, e.g., Lee v. Kemna*, 534 U.S. at 382 and n.13 ("Lee's predicament, from all that appears, was one Missouri courts had not confronted before ...." The state of Missouri had cited five "readily" distinguishable cases in support of an adequacy argument; none involving facts similar to those in Lee's case. The court remarked: "The adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar. But here, no prior decision suggests strict application to a situation such as Lee's.")

agree that Maples was *without* fault for the missed deadline for appeal. In *Shepard*, the court held defendant was not entitled to an out-of-time appeal, because a transcript of the sentencing hearing showed defendant had received notice of appeal rights from both the court and defense counsel. 598 So. 2d at 40. In *Alverson*, the court held petitioner was not entitled to an out-of-time appeal, because evidence failed to support allegations his attorney was careless or negligent in failing to file an appeal. These cases have no persuasive force in a "firmly established and regularly followed" analysis because they are factually distinct from the issue here. There was abundant evidence that Maples's counsel were "negligent" and the fault for failing to perfect his appeal should rest with them, not Maples. *Maples*, 586 F.3d at 897 (Barkett, J., dissenting).

II. The Failings Of Alabama's Post-Conviction System Contributed To Maples's Procedural Default And Will be Exacerbated By The Decision Below.

This Court should find that a state procedural rule is not "adequate" to deny an indigent, death-sentenced prisoner access to federal post-conviction relief, where the state provides no timely access to competent, appointed counsel and the indigent prisoner has not been provided a reasonable opportunity to comply with the rule.

It is well-established that a state procedural rule is not adequate to bar federal review where the prisoner was afforded no meaningful opportunity to comply with the rule. *See, e.g., Ford v. Georgia*, 498 U.S. at 423-24. While most of the decisions applying

this principle in habeas cases involve the novel, sporadic, or retroactive application of state procedural rules, a state's failure to provide any reasonable opportunity for compliance with its rules may also render the rule inadequate to bar federal review.

As below explained, Alabama's *ad hoc* arrangement for the appointment of post-conviction counsel in death penalty cases is broken and does not address claims of constitutional violations in the underlying case.

Alabama's failure to provide any assistance to capital habeas petitioners when filing their initial petition denies them any fair opportunity to seek state post-conviction relief, compounding the effect of constitutional deprivations suffered at trial, such as the provision of inadequate counsel. While Rule 32.1(f) may be capable of serving a legitimate and adequate purpose, its application in this case was inconsistent with judicial treatment of similar criminal defendants and was manifestly unfair. For this additional reason, the rejection of Maples's claims under that rule cannot serve as an adequate basis for withholding merits review in federal habeas proceedings.

Alabama does not have a state-wide public defender system. Instead, each court jurisdiction is free to create its own system for providing counsel to indigent defendants. Elected judges are responsible for deciding which type of indigent defense system the judicial district will use.[7] Thus, the indigent

---

[7] See Ala. Code § 15-12-2 (1975) (setting out three alternative methods for three different courts, for reaching the decision as to "the indigent defense system to be used"); Ala. Code § 15-12-

defense system in Alabama "not only fails to be independent of the judiciary, but is wholly dependent on it."[8]

The State of Alabama does not automatically provide counsel in post-conviction proceedings. Instead, appointments of post-conviction counsel in Alabama are made as a discretionary choice of the trial court, after a post-conviction proceeding has already been filed.[9] Most states' legislatures have

---

1(5) (1975) ("Indigent defense system" is defined as "(a)ny method or mixture of methods for providing legal representation to an indigent defendant, including use of appointed counsel, use of contract counsel, use of public defenders, or any alternative method meeting constitutional requirements."); Ala. Code § 15-12-3 (1975) (". . .Circuit courts may adopt rules, not in conflict with rules of the Supreme Court, to effectuate a system of indigent defense.")

[8] American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, at 99, 121 (June 2006). As a result of this system, only four of the sixty-seven Alabama judicial districts have public defender offices and only one of these offices provides representation at capital trials. *Id.*

[9] Ala. Code § 15-12-23(a) (1975) ("In proceedings filed in the district or circuit court involving the life and liberty of those charged with or convicted of serious criminal offenses including proceedings for habeas corpus or other post conviction remedies, and in post-trial motions or appeals in the proceedings, the trial or presiding judge or chief justice of the court in which the proceedings may be commenced or pending may appoint counsel to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person.") (Emphasis added).

recognized the critical role that post-conviction counsel serves in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners as a matter of right. *No* inmates are afforded counsel to file initial post-conviction petitions. Only afterwards might post-conviction counsel be appointed. Consequently, a post-conviction petitioner is only able to gain assistance of counsel *if* a court deems the initial petition, written without counsel, persuasive.

Appointed post-conviction counsel can be compensated at the rate of $60 per hour in-court and $40 per hour out-of-court, as are trial indigent defense counsel. Ala. Code § 15-12-21(d) (1975). This of course is a fraction of what they would be paid in their retained work.[10] But counsel appointed to indigent petitioners in post-conviction actions are further limited to a *total* payment of $1,000.[11]

Nor does Alabama provide any other type of assistance to condemned prisoners pursuing post-conviction litigation.[12] And Alabama allows only

---

[10] Joseph P. Van Heest, Rights of Indigent Defendants in Criminal Cases after Alabama v. Shelton, Alabama Lawyer (November 2002).

[11] Ala. Code § 15-12-23(d) (1975) ("The total fees to counsel for the proceedings shall not exceed one thousand dollars ($1,000).")

[12] "Despite the fact that Alabama now has the fastest-growing death row population in the United States, . . . it does nothing at all to provide its condemned inmates with timely legal assistance in preparing and presenting post-conviction claims. It appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It furnishes no

one year from the Court of Criminal Appeals' issuance of judgment, for the filing of the Rule 32 petition. Rule 32.2(c), Ala. R. Crim. P.

Because appointments of counsel are generally not made until after the initial post-conviction pleadings have been drafted and the case has already been filed, "most Rule 32 petitioners file their petitions without the assistance of legal counsel." *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005). "Therefore, inmates who are unable to find counsel to represent them before the limitations period for filing a Rule 32 petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their Rule 32 petition and prepare and file a petition in the proper form with the proper claims in the proper court." *Id.*

Yet, it is not uncommon for a Rule 32 court to rule on some or all of a petitioner's claims before appointment of counsel.[13] But delaying appointment

---

paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts not included in the trial record. . . . It maintains no central agency to monitor the progress of capital post-conviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support." Bryan Stevenson, Symposium: Pro Se Litigation Ten Years After AEDPA, 41 Harvard Civil Rights - Civil Liberties Law Review, 339, 353 (Summer 2006) (footnotes omitted).

[13] See, e.g., *Flowers v. State*, No. CC-97-20.60 (Montgomery County Cir. Ct. Jan. 28, 2003) (Order Dismissing the Rule 32 Petition As Untimely Filed) (dismissing petition filed pro se); *Smith v. State*, No. CC-98-2064.60 (Mobile County Cir. Ct. Oct. 9, 2002) (Order Dismissing the Rule 32 Petition as Untimely Filed) (dismissing petition filed pro se). See also, Rule 32.7(c),

until after the petition has been filed effectively deprives counsel of any meaningful opportunity to represent her client. Alabama's procedure for discretionary appointments is "problematic because there is too great a risk that the post-conviction court will be unable to accurately ascertain the need for an attorney on a case-by-case basis."[14]

With no state-funded institution or centralized system for providing capital post-conviction representation, Alabama death-sentenced prisoners have largely relied on volunteer counsel, recruited through non-profit organizations or the American Bar Association's Death Penalty Representation Project.[15]

Not surprisingly, it is difficult to recruit volunteer counsel for these complex cases. Even ten

---

Ala. R. Crim. P. ("If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.")

[14] Celestine Richards McConville, The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Post-conviction Counsel, 42 Tulsa L. Rev. 253, 257 (Winter 2006) (concluding "that Alabama's system fails to adequately protect the rights of capital inmates and thus does not provide a meaningful right to capital post-conviction counsel.")

[15] The Alabama Bar Association's laudable Volunteer Lawyers Project ("VLP") limits its recruitment for pro bono attorneys to certain non-criminal cases that are "simple, straightforward and appears to be resolvable within 20 hours or less." Pamela H. Bucy, The VLP and the Thief, 71 Alabama Lawyer 45 (January 2010).

years ago, when Alabama's death row was fifteen percent smaller, recruitment efforts were strained, as the director of the ABA project observed in 1999:

> Without doubt, Alabama is currently in need of the largest number of pro bono counsel. There are more than 250 capital indictments pending in the Alabama trial courts at any given time. With 173 death-sentenced individuals, Alabama has the fifth largest death row in the country...Although the ABA Death Penalty Representation Project has recruited attorneys for seven Alabama prisoners, at least 30 more men and women are in immediate need of post-conviction representation. No court in Alabama routinely appoints counsel for death row prisoners who have concluded direct appeal. If a condemned inmate files a post-conviction petition pro se, the circuit court may appoint a local lawyer whose total fee may not exceed $600. Counsel is not entitled to receive any money for investigation or expert assistance.

Elisabeth Semel, The Lone Star State Is Not Alone In Denying Due Process To Those Who Face Execution, 23 The Champion 28, 29 (July 1999) (footnotes omitted). Alabama's death row continues to grow, increasing the number of volunteer counsel

who must be found.[16]

Having to rely solely on volunteer counsel imposes numerous additional burdens on the ability to litigate post-conviction challenges to constitutional violations. Volunteer counsel are often unfamiliar with the complexities of habeas law. Volunteer counsel require ongoing training and mentoring.[17] Volunteer counsel from out of state have difficulty conducting time-intensive investigation into sensitive mitigation issues such as family histories of violence, abuse, and mental illness.[18] Volunteer counsel will have to spend a substantial amount of time on their death penalty

---

[16] *Id.*, McConville, supra at 257 - 258 (quoting Equal Justice Initiative of Alabama, Representation of Death Row Prisoners, http://www.eji.org/representation.html: "[i]n the past few years, Alabama sentenced more people to death per capita than any other state in the country.")

[17] Ron Tabak, The Private Bar's Efforts To Secure Proper Representation For Those Facing Execution, 29 Justice System Journal 356, 359 (2008).

[18] Robin M. Maher (current director of the ABA Death Penalty Representation Project), The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra Law Review 763, 771 (Spring 2008) ("Many of the volunteer lawyers that I recruit have never handled a death penalty case before. . . . Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers must handle. But unlike the law of capital punishment, which they will eventually learn and master, developing mitigation evidence that may result in a different sentence for their client is not easy for volunteer lawyers, even when they are among the country's top litigators [or] (f)or out-of-state lawyers who volunteer far from home ....")

cases, to the detriment of their private practice.[19]

Habeas cases require expert services, which must also be either volunteered or paid.[20] The need for substantial funds to support the initial investigation and necessary expert services is another factor that may influence the search for volunteer counsel. The substantial time and financial commitment required by these cases makes it difficult for firms to offer their services, especially for smaller firms or solo practitioners. This also increases the likelihood volunteer counsel will have to be sought from large, well-funded firms outside the state, even though such lawyers will be less familiar with state rules, state practice, and local investigation options.

Unless it is reconsidered, the Eleventh

---

[19] "One survey estimated that taking one capital case through the state post-conviction proceeding alone requires one-fifth to one-fourth of a private attorney's yearly workload." Comment, 18 Hastings Constitutional Law Quarterly 211, 235, citing Wilson & Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 Judicature 331, 336 - 337 (1989). Even the Model Rules of Professional Conduct recommend only that lawyers donate only 50 hours of pro bono time per year, far less than a capital habeas case will require. Model Rules of Prof. Conduct R. 6.1 (2008) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

[20] Hannah Jacobs Wiseman, Pro Bono Publico: The Growing Need for Expert Aid, 60 S. C. L. Rev. 493, 495 (Winter 2008) ("Increasingly, experts are necessities in legal cases, and low income individuals without access to quality expert testimony are at a strong disadvantage.")

Circuit's decision in *Maples* will not only directly deny access to federal constitutional review to death-sentenced prisoners who are faultless in their procedural predicament; it will also have a chilling effect on the already-difficult task of finding volunteer counsel to represent Alabama Death Row prisoners in capital post-conviction litigation. Capital post-conviction litigation is complex, difficult, and stressful. The Eleventh Circuit's decision, if allowed to stand, adds to this pro bono burden a legal principle that small mistakes, which will inevitably occur even where counsel are well-intentioned, will have devastating legal significance. Alabama's failure to provide death-sentenced prisoners any reasonable opportunity for compliance with its post-conviction rules, including the rule at issue in Maples's case, renders the rule inadequate to bar federal review.

CONCLUSION

Respectfully, this Court should grant Maples's Petition for a Writ of Certiorari, vacate the Eleventh Circuit's divided panel opinion, and remand this case with the direction that Maples's federal post-conviction action be allowed to proceed.

Respectfully submitted,

Wayne Morse, Jr.
Counsel of Record
Susan J. Walker
2323 Second Ave. N
Birmingham, AL 35203

Christine A. Freeman
817 South Court Street
Montgomery, AL 36103

Attorneys for *Amicus Curiae*

AMICUS CURIAE BRIEF

No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE WRIT 7

I. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS IN FAILING TO RECOGNIZE THE STATE'S OWN FAILURE TO PROVIDE NOTICE. 7

II. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT ATTORNEY ABANDONMENT IS NO CAUSE TO EXCUSE A PROCEDURAL DEFAULT 13

III. THE EQUITIES OF THIS CASE WARRANT THE COURT'S INTERVENTION 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. *Dugger*, 841 F.2d 371 (11th Cir. 1988) 9

Amadeo v. *Zant*, 486 U.S. 214 (1988) 8

Brown v. *Allen*, 344 U.S. 443 (1953) 8

Coleman v. *Thompson*, 501 U.S. 722 (1991) ..... *passim*

Cone v. *Bell*, 129 S. Ct. 1769 (2009) 4

Dorman v. *Wainwright*, 798 F.2d 1358 (11th Cir. 1986) 9

Dugger v. *Adams*, 489 U.S. 401 (1989) 16

Gregg v. *Georgia*, 428 U.S. 153 (1976) 17

Henderson v. *Campbell*, 353 F.3d 880 (11th Cir. 2003) 18

Holland v. *Florida*, 130 S. Ct. 2549 (2010) ..... *passim*

Jimenez v. *Fla. Dep't of Corr.*, 481 F.3d 1337 (11th Cir. 2007) 18

Jones v. *Flowers*, 547 U.S. 220 (2006) 6, 10, 11, 12

Knight v. *Schofield*, 292 F.3d 709 (11th Cir. 2002) 9

Lawrence v. *Florida*, 421 F.3d 1221 (11th Cir. 2005) 9

Lawrence v. *Florida*, 549 U.S. 327 (2007) 9

Manning v. *Foster*, 224 F.3d 1129 (9th Cir. 2000) 15

TABLE OF AUTHORITIES—Continued

Page

McCleskey v. *Zant*, 499 U.S. 467 (1991) 8, 16

Munaf v. *Geren*, 553 U.S. 674 (2008) 16

Murray v. *Carrier*, 477 U.S. 478 (1986) 5, 7, 10,13

Reed v. *Ross*, 468 U.S. 1 (1984) 7, 16

Roberts v. *Sutton*, 217 F.3d 1337 (11th Cir. 2000) 8

Robinson v. *Hanrahan*, 409 U.S. 38 (1972) 10

Rouse v. *Lee*, 339 F.3d 238 (4th Cir. 2003) 15

Sanders v. *United States*, 373 U.S. 1 (1963) 16

Sanders v. *United States*, 113 F.3d 184 (11th Cir. 1997) 9

Schlup v. *Delo*, 513 U.S. 298 (1995) 16

Siebert v. *Allen*, 455 F.3d 1269 (11th Cir. 2006) 9

Spottsville v. *Terry*, 476 F.3d 1241 (11th Cir. 2007) 9

Strickler v. *Greene*, 527 U.S. 263 (1999) 8, 10

United States v. *Novaton*, 271 F.3d 968 (11th Cir. 2001) 9

Wainwright v. *Sykes*, 433 U.S. 72 (1977) 7

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 17

STATUTE:

28 U.S.C. § 2254 16

TABLE OF AUTHORITIES—Continued

Page

RULE:

Ala. R. Crim. P. 32 ..... *passim*

OTHER MATERIAL:

The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) 2

IN THE

Supreme Court of the United States

No. 10-63

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

INTEREST OF AMICUS CURIAE

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project's essential mission is to promote constitutional dialogue.[1] It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of amicus' intent to file this brief more than 10 days in advance and have consented to its filing.

citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. The Committee issued its first report in 2001, and in 2005, issued an updated version of its report with thirty-two consensus recommendations. *See* The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) (www.constitutionproject.org/manage/file/30.pdf). The report concludes, *inter alia*, that the "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Id.* at 1.

The Constitution Project has a keen interest in the Court's review of this case. Petitioner's trial counsel displayed a shocking degree of ineffectiveness. Yet under the rule adopted by the Eleventh Circuit, petitioner will be put to death without any federal habeas review of that claim, through no fault of his own, even though the constitutionally inadequate performance of his trial counsel most likely resulted in his death sentence.

Amicus curiae fully supports petitioner's position that there was no procedural default that barred federal habeas review in this case, because Alabama lacked an adequate state law basis for barring federal habeas review where a defendant is faultless. But this brief addresses the reasons why, even if there was a procedural default, it should be excused for "cause," and petitioner should be allowed federal habeas review of his claims.

The representation of prisoners accused of capital crimes or sentenced to the death penalty is unique in its difficulty, and in the consequences for prisoners when that representation is inadequate. Protection of prisoners' constitutional rights requires an effective system of representation, and constitutionally adequate performance by courts and counsel in ensuring that prisoners receive fair notice of orders on which their lives may depend. The Court should grant the petition to review the important issues raised by this case.

SUMMARY OF THE ARGUMENT

A man should not be executed because, through no fault of his own, he never received notice of a deadline-triggering court order. Petitioner Maples' post-conviction counsel timely filed a state habeas

petition (the "Rule 32 petition") that raised serious claims that Maples was denied effective assistance of trial counsel. Pet. App. 30-31 & n.3. But then they left their firm—and thus their representation of Maples—without substituting counsel or even leaving a forwarding address. A mailroom returned the order denying the petition to the clerk unopened, but the court clerk that received the unopened envelope by return mail did nothing while appellate deadlines lapsed.

And there Maples' life—according to the Eleventh Circuit—will come to an end without any federal court review of his claims that he was denied constitutionally guaranteed assistance of counsel at trial. The State now intends to put Maples to death, but it failed to take the most obvious, reasonable steps to ensure that he received timely notice of the deadline-triggering order. That failure, combined with his post-conviction counsel's abandonment, left Maples barred from further review of his claims through no fault of his own. The Court's review is warranted to make clear—consistent with the Court's precedent—that federal courts are not bound by such errors to ignore claims that would save a man's life.

Petitioner has persuasively shown that the alleged procedural default was no default at all because Alabama lacked an "adequate" state-law ground, *Cone* v. *Bell*, 129 S. Ct. 1769, 1780 (2009), to deny review of his claims. That issue alone warrants this Court's review. *See* Pet. 12-24. But in addition, the Court's review is also required because the Eleventh Circuit disregarded and misapplied this Court's precedents in holding that neither the failure of the State to notify Maples of a deadline-triggering order,

nor the abandonment of his counsel, are "cause" to overcome the purported procedural default.

The Eleventh Circuit held that Maples was not entitled to federal habeas review, notwithstanding grievous errors of the State and his counsel, because he had no right to post-conviction representation. Pet. App. 17a (citing *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991)). This Court's decision in *Coleman* requires no such thing. A petitioner "bears the risk in federal habeas for all attorney errors made in the course of the representation." *Coleman*, 501 U.S. at 754. But where there is "something external to the petitioner, something that cannot fairly be attributed to him," *id.* at 753, a court may excuse procedural default on collateral review for "cause." *See also Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). Here, the clerk's failure to ensure that Maples received notice of an order that deprived him of fundamental rights was one such objective factor. And the abandonment of Maples by the post-conviction counsel who prepared his Rule 32 petition was another. Pet. 27-32; *cf. Coleman*, 501 U.S. at 754. The Court's review is warranted to ensure that courts uniformly consider both the State's own conduct and abandonment by post-conviction counsel as causes of a procedural default, and to ensure that a prisoner is not barred from federal corpus review of constitutional claims because of either.

This Court has long held that constitutionally inadequate actions of the *State* constitute cause to excuse a procedural default. And the Court has held that the State acts inadequately when knowledge that a mailing was ineffective "triggered an obligation on the government's part to take additional steps to effect notice," but it failed to take

such steps. *Jones* v. *Flowers*, 547 U.S. 220, 230 (2006). But the court below ignored this factor, solely because Maples lacked a right to post-conviction *counsel*. The clerk's failure to deliver notice of the Rule 32 order was an independent due process violation, external to Maples, that prevented him from timely raising claims that he received ineffective assistance of trial counsel. The Court should grant review to ensure that lower courts uniformly consider the State's contribution to a procedural default as cause to excuse that default.

Review is also warranted to conform the "cause" inquiry with the standards recently announced in *Holland* v. *Florida*, 130 S. Ct. 2549 (2010). There, the Court held that the equitable principles that govern habeas review required tolling the federal limitation period where an attorney had effectively abandoned his client. Unlike in *Coleman*, such abandonment involves circumstances "beyond [a defendant's] control" because "a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 2568 (Alito, J., concurring).

Even more so than in *Holland*, adherence to the purported procedural fault would contravene the equitable principles that govern habeas review. In *Holland*, the defendant at least had an attorney, albeit one who failed to do his bidding. Here, Maples' failure to receive notice was "beyond his control" not only because the State failed in its constitutional duties, but also because his attorneys had quite literally left Maples behind and had ceased to "operat[e] as his agent in any meaningful sense of that word." *Id.* It is one thing to attribute errors of post-conviction counsel to their clients, it is quite

another to put a defendant to death where counsel has entirely abandoned him.

Although Maples' death sentence, imposed by the minimum allowable verdict, is likely the result of the constitutional ineffectiveness of his trial counsel, he never received any review of the order denying that claim through no fault of his own. The Court should grant review to clarify that, in accord with the Court's precedents, "cause" to excuse a purported default exists both because of the State's own failure to provide the requisite due process and because his counsel abandoned their representation of him. That this case involves multiple levels of error, rather than just one, is no reason to put a man to death.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS IN FAILING TO RECOGNIZE THE STATE'S OWN FAILURE TO PROVIDE NOTICE.

The Court has established a judge-made rule that when a petitioner has "cause" for not following a state procedural rule, and suffered prejudice as a result, the default may be excused. *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). *Sykes* left open "for resolution in future decisions the precise definition of the 'cause'-and 'prejudice' standard." *Id.* And due to the "virtually limitless array of contexts in which a procedural default can occur," the Court has not given the term "cause" precise content. *Reed* v. *Ross*, 468 U.S. 1, 13 (1984). But the Court has long held that there is "cause" to excuse a state procedural default if "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488.

Here, the clerk's failure to forward the Rule 32 order to Maples or his putative counsel was an "objective factor" that impeded the effort to comply with the deadline for appealing that order.

Objective factors that impede counsel's efforts to comply with the State's procedural rule include "interference by officials" that makes such compliance with the procedural rules impracticable. *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (citation and quotation omitted); *see also Brown* v. *Allen*, 344 U.S. 443, 486 (1953) ("some interference by officials" made compliance impracticable, and constituted "cause"). For example, in *Strickler* v. *Greene*, 527 U.S. 263 (1999), the Court held that a petitioner established cause for failing to raise a *Brady* claim where the prosecution withheld exculpatory evidence and the petitioner reasonably relied on the prosecutor's "open file" policy as fulfilling the prosecution's duty to disclose such evidence. *See also Amadeo* v. *Zant*, 486 U.S. 214, 222 (1988) (government concealment of evidence cause for a procedural default if it "was the reason for the failure of a petitioner's lawyers to raise the jury challenge in the trial court").

Here, the Eleventh Circuit erroneously failed to address the clerk's failure to ensure that Maples received the Rule 32 order as an objective factor that caused the procedural default. In other cases, the Eleventh Circuit had found cause to excuse prisoners' procedural defaults where they were due to the State's clerical errors but no fault of the prisoner. *See Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000) (default excused for "cause" when the appellate record was not properly transmitted to a state court of appeals, because there was "nothing

in the record to suggest that Roberts was responsible" for the problem).[2] The court had also equitably tolled deadlines for clerical errors.[3] But when it came to Maples' case, the Eleventh Circuit failed to address the implications of the clerk's failure to deliver notice to Maples' lead counsel, even though it was the central reason why Maples could not timely appeal that order.

The Alabama Court of Criminal Appeals recognized that the clerk in this case "assumed a duty to notify the parties of the resolution of the Rule 32 petition." App. 234a, 236a. The court, however, concluded that no due process violation occurred as a result, because counsel had a duty to notify the clerk of a change of

---

[2] *See also Siebert* v. *Allen*, 455 F.3d 1269, 1272 (11th Cir. 2006) (in determining "cause," considering whether clerk sent judgment in compliance with relevant rule of appellate procedure); *United States* v. *Novaton*, 271 F.3d 968, 992-93 (11th Cir. 2001) (appellant not accountable for exhibits not included in record "[t]hrough no fault of his own"); *Sanders* v. *United States*, 113 F.3d 184, 187 (11th Cir. 1997) ("when through no fault of his own, a *pro se* litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court"); *Alexander* v. *Dugger*, 841 F.2d 371 (11th Cir. 1988) (*pro se* litigant's motion for rehearing never docketed by clerk); *Dorman* v. *Wainwright*, 798 F.2d 1358 (11th Cir. 1986) (state's failure to provide appellant with trial transcript within reasonable time constituted "external factor" out of appellant's control that sufficed as "cause").

[3] *See Lawrence* v. *Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) (equitable tolling applies "when the State's conduct prevents the petitioner from timely filing"), *aff'd* 549 U.S. 327 (2007); *Knight* v. *Schofield*, 292 F.3d 709, 712 (11th Cir. 2002) (petitioner misled by court clerk); *Spottsville* v. *Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (petitioner misled by the state habeas court into filing with wrong court).

address. Pet. App. 234a, 236a. That reasoning ignores the State's own, independent duties once it had affirmatively learned that attempted service on counsel was never made. In *Strickler*, the state failed to perform its independent duty to turn over exculpatory evidence, and there was "cause" to excuse the default engendered by the defendant's failure to file a motion seeking the withheld materials where the defendant had relied on the state's duty. 527 U.S. at 284. Here, as well, the State's failure to fulfill its duty to give notice of a deadline triggering-order in a state habeas proceeding excuses Maples alleged procedural default. The State, in the person of the circuit clerk, was an objective factor denying due process to Maples by failing to ensure he received the Rule 32 order, which was the sole reason he could not comply with the deadline for appealing the order. That the State's interference occurred after the denial of the Rule 32 order does not matter, because "the standard for cause should not vary depending on the timing of a procedural default." *Murray*, 477 U.S. at 491.[4]

In analogous—but less dire—circumstances, the Court has held that a state's failure to deliver notice

---

[4] It is not enough that local counsel received a copy of the order. Due process requires "the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230 (citing *Robinson* v. *Hanrahan*, 409 U.S. 38, 40 (1972) (notice of forfeiture proceedings sent to home address inadequate when State knew that owner was in prison)). Lead counsel "performed all of the substantive work" in the case, Pet. App. 3a, and the clerk knew that that counsel had not received notice of the order, which had unexpectedly been issued *sua sponte* nearly a year and a half after the petition was filed. Pet. 6.

of a deprivation of fundamental rights violates basic due process. In *Jones* v. *Flowers*, a Commissioner's repeat attempts to send a tax sale notice by certified mail resulted in the return of the unopened packet "unclaimed," leaving the homeowner with no notice before his house was sold. 547 U.S. at 223-24. That failed to satisfy the longstanding rule that "when notice is a person's due * * * [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 229 (citation omitted).

Writing for the Court, Chief Justice Roberts reasoned that "no one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.'" *Id.* at 229. Knowledge that certified mail sent to the homeowner's address was ineffective "triggered an obligation on the government's part to take additional steps to effect notice," *id.* at 230, and the failure to follow up was unreasonable, even though the letters were reasonably calculated to reach their intended recipients when delivered to the postman. *Id.* at 229. As the Court analogized, "[i]f the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again." *Id.* "This is especially true when * * * the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." *Id.* at 230. But the Commissioner did "nothing." *Id.* at 234. When exerting extraordinary power against a property owner, "[i]t is not too much

to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id.* at 239.

The same is necessarily true here, where a man's life, rather than just his property, is at stake. The Rule 32 order was a deprivation notice just as much as the notice in *Jones* was. Unless Maples responded within 42 days to the order by appealing it—or satisfied the requirements for an out-of-time appeal—he would be defaulted. Alabama rules expressly permitted an out-of-time appeal in these circumstances, and the Eleventh Circuit erred by holding that reliance on the appeal deadline was an "adequate" basis for a default. *See* Pet. 12-24. But even if that decision were correct, this Court's precedents establish that the State's failure to satisfy due process was sufficient cause to excuse that purported procedural fault.

As in the Court's analogy in *Jones*, the unopened, returned envelope with "Return to Sender—Left Firm" was the equivalent of watching the Rule 32 notice fall out of the postman's bag and down the drain. As a matter of basic due process, the State was required to do more to ensure that Maples received notice. Something as simple as a call to counsel's former firm to ask for a forwarding address would have allowed the clerk to direct the notice to the proper person. Or, at a bare minimum, the clerk should have sent the notice to Maples directly when he or she learned that his lead counsel did not receive it. Such simple, virtually costless actions could have ensured Maples appellate review, which in turn could save him from legal errors that would spare his life.

The Eleventh Circuit's wholesale failure to address the State as an objective factor placed the court in conflict with this Court's precedents, and is reason enough to grant review. But as next shown, the Court's overreaching interpretation of *Coleman* to exclude a finding of "cause" in cases of attorney abandonment is yet another reason.

II. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT ATTORNEY ABANDONMENT IS NO CAUSE TO EXCUSE A PROCEDURAL DEFAULT.

The State's failure to provide notice was not the only factor that caused Maples' default. He was also abandoned by his post-conviction counsel, even though he had relied on them to represent him. In *Coleman*, the Court held that *"[s]o long as a defendant is represented by counsel* whose performance is not constitutionally ineffective * * * we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 501 U.S. at 752 (quoting *Murray*, 477 U.S. at 488) (emphasis added). In such circumstances, errors by attorneys are attributed to the clients whom they are representing, and the clients bear those risks. But a defendant cannot bear the risk of attorney error when his attorney is no longer is representing him. Here, the evidence is that Maples' post-conviction counsel had literally left the scene without giving the clerk a forwarding address, thereby leaving him to his own devices. In that situation, he had no way to exercise his rights because he never received notice of the order denying his petition.

In *Holland*, the Court recently reversed as "too rigid" the Eleventh Circuit's rule that even "grossly negligent" attorney conduct could never warrant equitable tolling of the federal habeas limitation period. 130 S. Ct. at 2554. That case involved "a complete breakdown in communication" between a habeas petitioner and his attorney, who had "abandoned" his client, *id.* at 2555, necessitating the client's own filing of an untimely federal habeas petition. *Id.* at 2559. The Court held that the petitioner was entitled to equitable tolling because he had diligently pursued his rights, yet "'some extraordinary circumstance stood in his way'" that prevented timely filing. *Id.* at 2562 (citation omitted).

Although *Holland* involved the closely related doctrine of equitable tolling of federal limitations periods, Justice Alito explained how its reasoning applies to the "cause" standard at issue in this case. When an attorney has "effectively 'abandoned'" a habeas petitioner, that "suffice[s] to establish extraordinary circumstances beyond his control" because "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 2568 (citing *Coleman*, 501 U.S. at 754). Justice Alito therefore concurred in remanding the case because the Eleventh Circuit "did not consider petitioner's abandonment argument or assess whether the State improperly prevented petitioner from either obtaining new representation or assuming the responsibility of representing himself." *Id.*

Likewise in this case, Maples' attorneys "effectively abandoned" him by leaving without substituting counsel and were "not operating as his agent in any

meaningful sense of that word." And likewise in this case, the Eleventh Circuit did not properly consider Maples' abandonment argument or assess whether the State, by failing to notify him directly when his counsel's notification was returned, "improperly prevented him from obtaining new representation or assuming the responsibility of representing himself."

The Eleventh Circuit's failure to recognize that fact also conflicts with the decisions of other circuits which, even before *Holland*, held that such conduct constitutes "cause" to excuse procedural default. *See Manning* v. *Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to the client where attorney "does not actually represent the client"); *see also Rouse* v. *Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (assuming "utter abandonment" was external cause); Pet. 29-30. The State's concomitant failure to ensure notice only compounds the error.

The Eleventh Circuit held that "the factor that resulted in Maples' default—namely, counsel's failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel." Pet. App. 17a. But that analysis is refuted by the reasoning in *Holland*. Once counsel had abandoned the representation, Maples' lack of notice—through no fault of his own—was "something external * * * that cannot fairly be attributed to him," which excuses the purported default. *Coleman*, 501 U.S. at 753. Counsel's abandonment was, in the words of the *Holland* majority, an external "impediment to the pursuit of his legal remedy." 130 S. Ct. at 2565. Or, as Justice Alito explained with direct reference to the standard at issue here, it was an "extraordinary

circumstance[] beyond his control" that "improperly prevented petitioner from either obtaining new representation or assuming the responsibility of representing himself." *Id.* at 2568.

Thus, the Court's decision in *Holland*, issued after the Eleventh Circuit ruled in this case, only underscores the Eleventh Circuit's errors and the need for this Court's review.

III. THE EQUITIES OF THIS CASE WARRANT THE COURT'S INTERVENTION

"[T]he only writ explicitly protected by the Constitution," *Holland*, 130 S. Ct. at 2562, habeas corpus is "an area of the law where equity finds a comfortable home." *Id.* at 2561 (citing *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008)). *See Schlup* v. *Delo*, 513 U.S. 298, 319 (1995) ("Habeas corpus is, at its core, an equitable remedy."); *Sanders* v. *United States*, 373 U.S. 1, 17 (1963). And in exercising its habeas jurisdiction, the Court has "equitable discretion to correct a miscarriage of justice." *McCleskey*, 499 U.S. at 502. That discretion includes the "equitable power to overlook [a] respondent's state procedural default." *Dugger* v. *Adams*, 489 U.S. 401, 410 (1989). *See Reed*, 468 U.S. at 9, 11 ("Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated") (citations omitted).

As explained by the dissenting judge in the Eleventh Circuit, Pet. App. 31a, these same equitable principles that underlie the Great Writ require excusing Maples' purported default because reliance on such unfair procedural obstacles "'must

yield to the imperative of correcting a fundamentally unjust [sentence]." Pet. App. 31a (Barkett, J., dissenting) (citation omitted). The Court's subsequent reasoning in *Holland*, which reversed another parsimonious Eleventh Circuit decision, underscores the need for this Court's review in this case as well. Every bit as much as in *Holland*, this case warrants review to shed rigid and inflexible adherence to the "evils of archaic rigidity," 130 S. Ct. at 2563, that employ procedural obstacles to bar federal habeas review through no fault of a petitioner. Just as Holland's attorney's abandonment prevented his timely filing of a federal petition, the abandonment of Maples' attorneys, combined with the State's failure to notify him directly, left Maples unable to meet the alleged state appeal deadline.

The inflexible rule used to extinguish review of Maples ineffective assistance claims is particularly unacceptable in this capital case. "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). In its finality, death is "qualitatively different from a sentence of imprisonment, however long," creating a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Here, the ineffective assistance of Maples' trial counsel—which resulted in the bare minimum verdict necessary to impose the death sentence, Pet. 31a n.3—renders that sentence wholly unreliable. And all possible review of the decision denying his ineffective assistance claims was barred because Maples received yet *more* ineffective assistance at the post-conviction

stage (albeit not in the constitutional sense), aggravated by the State's deprivation of notice.

The Court should grant review to avoid this intolerable result and to correct the Eleventh Circuit's departure from the precedents of this Court and other circuits. This case is an excellent vehicle to consider the issues, given that Maples is indisputably blameless for the alleged procedural default, Pet. 10, and has strong claims that his trial counsel was constitutionally ineffective, Pet. App. 30a-31a & n.3. Maples properly raised those claims at the first opportunity to do so, through the Rule 32 petition.[5] But as the result of the alleged procedural default, he lost *all* opportunity for appellate review—state and federal—of the order denying his Rule 32 petition. Barring relief from this Court, Alabama will put Maples to death without any federal court hearing on his significant claims regarding the ineffective assistance of his trial counsel that likely caused the death sentence. Thus, the constitutional deprivations of clerk and counsel, for which Maples was entirely blameless, likely resulted in real and direct constitutional harm that can only be corrected by this Court's review.

---

[5] Notably, the decision below relied on cases in which defaults resulted from failures to present claims on initial state habeas review. Pet. App. 17a-18a. *Cf. Jimenez* v. *Fla. Dep't of Corr.*, 481 F.3d 1337, 1344 (11th Cir. 2007); *Henderson* v. *Campbell*, 353 F.3d 880, 899-900 (11th Cir. 2003). By contrast, Maples presented his ineffective assistance of counsel at the commencement of state habeas review via the Rule 32 petition.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

Library of Congress
Law Library

No. 10-63

AUG 1 1 2010

IN THE

Supreme Court of the United States

PRINTER RECORDS AND BRIEFS

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
MICHAEL TYE
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THIS COURT'S GUIDANCE IS URGENTLY NEEDED ON THE DOCTRINE OF ADEQUATE STATE GROUNDS	4
II. THIS CASE IS AN IDEAL COMPANION TO *WALKER v. MARTIN*	6
A. *Walker* Presents Only One Side of the State-Federal Balance Needed to Clarify the Adequate State Ground Doctrine	7
B. The Federal Interests in this Death Penalty Case Are Substantial, Making It a Fitting Companion to *Walker*	10
C. *Walker* and this Case Provide the Best Context in Which to Balance the Competing State and Federal Interests Over Which Party Bears the Burden of Proving Adequacy	18

Contents

Page

D. This Case Provides Much Needed Context to *Walker* to Enable the Careful Calibration of the Boundaries of State Case-Law-Based Interpretation of Timeliness Rules 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Beard v. Kindler,
130 S. Ct. 612 (2009) ..... *passim*

Bostick v. Stevenson,
589 F.3d 160 (4th Cir. 2009) 22

Coleman v. Thompson,
501 U.S. 722 (1991) 3, 6

Cone v. Bell,
129 S. Ct. 1769 (2009) 5

Davis v. Wechsler,
263 U.S. 22 (1923) 8-9

Ex parte Johnson,
806 So. 2d 1195 (Ala. 2001) 12

Ex parte Miles,
841 So. 2d 242 (Ala. 2002) 12

Ex parte Robinson,
865 So. 2d 1250 (Ala. Crim. App. 2003) 12

Ford v. Georgia,
498 U.S. 411 (1991) 9

Harris v. Alabama,
513 U.S. 504 (1995) 18

Authorities

Page

Henderson v. Campbell,
353 F.3d 880 (11th Cir. 2003) 19

Holland v. Florida,
130 S. Ct. 2549 (2010) 20, 23

Jones v. Sussex I State Prison,
591 F.3d 707 (4th Cir. 2010) 19

Lee v. Kemna,
534 U.S. 362 (2002) 3, 6, 9-10

Lonchar v. Thomas,
517 U.S. 314 (1996) 23

Martin v. Walker,
357 F. App'x 793 (9th Cir. 2009) ..... *passim*

Murray v. Giarratano,
492 U.S. 1 (1989) 12

New York v. Hill,
528 U.S. 110 (2000) 11

New York v. United States,
505 U.S. 144 (1992) 8

Paredes v. Quarterman,
574 F.3d 281 (5th Cir. 2009) 19

Siebert v. Allen,
455 F.3d 1269 (11th Cir. 2006) 19

Authorities

Page

STATUTES AND RULES

Ala. Code § 13A-5-47(d)-(e) 17

Ala. R. Crim. P. 32.1(e) 11

Ala. R. Crim. P. 32.1(f) 10-11, 22

OTHER AUTHORITIES AND MATERIALS

American Bar Ass'n,
Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report (2006) ... 15-16, 17-18

American Civil Liberties Union,
Broken Justice: The Death Penalty in Alabama (2005) 15, 17-18

John H. Blume et al., *In Defense of Non-capital Habeas: A Response to Hoffman and King* (Cornell Law Faculty Working Papers, Paper No. 66, 2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops_papers 13, 20

Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petition for Writ of Certiorari, Walker v. Martin, No. 09-996 (U.S. Mar. 24, 2010) 5

Authorities

Page

Brief of *Amici Curiae* States of California [and Twenty-Five Other States], Beard v. Kindler, 130 S. Ct. 612 (2009) (No. 08-992) 8

Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994) 16

Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079 (2006) 16

Crystal Nix Hines, *Lack of Lawyers Blocking Appeals in Capital Cases*, N.Y. Times, July 5, 2001 17

Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* (2007) 12-14

James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) 12

NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Winter 2010* (2010) 14

Petition for Writ of Certiorari, Walker v. Martin, No. 09-996 (U.S. Feb. 17, 2010) ..... *passim*

Authorities

Page

Eve Brensike Primus,
A Structural Vision of Habeas Corpus,
98 Calif. L. Rev. 1 (2010) 4

Recent Case,
Federal Courts–Habeas Corpus–Fourth Circuit Fails to Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine,
120 Harv. L. Rev. 2246 (2007) 4

Reply to Brief in Opposition, Walker v. Martin,
No. 09-996 (U.S. May 27, 2010) 21, 23

Sara Rimer,
Questions of Death Row Justice for Poor People in Alabama, N.Y. Times, Mar. 1,
2000 17

Tracy L. Snell,
Bureau of Justice Statistics, U.S. Dep't of Justice, ***Capital Punishment, 2005*** (2006), ***available at*** http://bjs.ojp.usdoj. gov/content/ pub/pdf/cp05.pdf. 13, 15

Tracy L. Snell,
Bureau of Justice Statistics, U.S. Dep't of Justice, ***Capital Punishment, 2008 - Statistical Tables*** (2009), ***available at*** http:// bjs.ojp.usdoj.gov/content/ pub/pdf/cp08st.pdf
..... 13, 14

Authorities

Page

Bryan A. Stevenson,
Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases, 41 Harv. C.R.-C.L. L. Rev. 339 (2006) 4, 14, 20

U.S. Census Bureau,
Table 1: Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009 (2009), http://www.census.gov/popest/states/NST-ann-est.html 14-15

16B Charles Alan Wright et al.,
Federal Practice and Procedure (2d ed. 1996 & Supp. 2010) 3, 4, 6, 8

Larry W. Yackle,
State Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 Cornell L. Rev. 541 (2006) 4

STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. To that end, NACDL frequently has filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

The present case is of particular importance to NACDL because this Court's review urgently is needed both to clarify the standards governing when a state default rule is "adequate" to bar federal habeas review and to correct a manifest injustice where a man's life literally hangs in the balance.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for both parties received notice of *amicus curiae*'s intent to file this brief more than 10 days prior to the brief's due date and have consented to its filing in letters being lodged herewith.

SUMMARY OF ARGUMENT

Cory Maples did not receive notice of an Alabama state court order denying his claims of federal constitutional error because a large New York law firm returned the order to the state court unopened. The Alabama clerk's office, upon receipt of the unopened notice, did nothing in response. The State then waited until the time for appeal had expired to notify Maples of the order. As a result, Maples missed the deadline for his state court appeal, and is to be executed without review of strong claims that he—like so many indigent defendants subject to Alabama's long-criticized and underfunded indigent defense system—received constitutionally ineffective assistance of counsel at trial and at sentencing.

This result was possible only because the Alabama courts—in the face of a written procedural rule allowing for out-of-time appeals where the "failure was without fault on the petitioner's part"—denied Maples's appeal as untimely. A divided Eleventh Circuit compounded that injustice, holding that the State's application of its procedural rule was "adequate" and therefore barred federal habeas review.

As the petition demonstrates, the Eleventh Circuit's decision conflicts with the decisions of this Court and other circuits in several respects, and exacerbates the uncertainty that already permeates the law governing procedural defaults. Pet. at 9-32. While this alone merits review, the Court's recent grant of certiorari in *Martin v. Walker*, 357 F. App'x 793 (9th Cir. 2009), *cert. granted*, 09-996, confirms the need for clarity in this area.

The present case is an ideal companion to *Walker* for several reasons. *First*, this Court has recognized

that, at its core, the adequate state ground doctrine is "about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). The doctrine thus "must be measured in the tension that exists between the interest in protecting federal rights and the potentially conflicting interests of state courts in adhering to their own procedures." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027 (2d ed. 1996 & Supp. 2010); *accord Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting). *Walker* presents the Court with a narrow context in which to strike that balance—the State there singularly focuses on "state sovereignty" and state interests in seeking this Court's "broad guidance" on the adequacy doctrine. This case would permit the Court also to consider the doctrine in the context of the substantial countervailing federal interests underlying the adequacy inquiry: Alabama seeks to execute a man after its courts contorted a state procedural rule to prevent the enforcement of essential federal rights.

Second, this case and *Walker* together provide a complete framework in which to resolve a conflict regarding which party bears the burden of proving the state rule is "adequate." In *Walker*, the Ninth Circuit properly allocated the burden to the State; the Eleventh Circuit below allocated the burden to the prisoner.

Finally, whereas *Walker* concerns the adequacy of a judge-made, overtly discretionary rule, this case involves a complementary and more robust context in which to provide guidance on the adequacy inquiry: the application of a written timing rule interpreted under an evolving body of state case law.

In all events, this case alone is worthy of the Court's review. The grant of certiorari in *Walker* only heightens the need for plenary review here.

ARGUMENT

I. THIS COURT'S GUIDANCE IS URGENTLY NEEDED ON THE DOCTRINE OF ADEQUATE STATE GROUNDS

This Court's immediate guidance and clarification is manifestly needed on the standards governing when a state default rule is "adequate" to bar federal habeas corpus review.

Commentators have characterized the law in this area as "unworkable,"[2] "constantly changing,"[3] and riddled with "confusion as to when a state procedural default is an adequate state ground to preclude federal habeas review."[4] The leading federal procedure treatise dedicates entire sections to discussing the prevailing "uncertainty," trying to glean "possible interpretations" from procedural default jurisprudence.[5] States likewise

---

[2] Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 Calif. L. Rev. 1, 1, 4 (2010); *accord, e.g.*, Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 Cornell L. Rev. 541, 559 & n.106 (2006).

[3] Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 349 (2006).

[4] Recent Case, *Federal Courts–Habeas Corpus–Fourth Circuit Fails to Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine*, 120 Harv. L. Rev. 2246, 2246 (2007).

[5] 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4028 (2d ed. 1996 & Supp. 2010); *see also id.* § 4027.

have urged this Court "to further clarify the rules relating to the 'adequacy' of state procedural bars."[6]

Indeed, Justices of this Court recently have recognized that, in the "proper case," concerns relating to the adequacy inquiry "should be addressed." *Beard v. Kindler*, 130 S. Ct. 612, 620 (2009) (Kennedy, J., joined by Thomas, J., concurring). But the proper case thus far has eluded the Court, principally because the issues have arisen in atypical contexts, rendering them "unsuitable vehicle[s] for providing broad guidance on the adequate state ground doctrine." *Id.* at 619 (majority opinion); *see also Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009) (Roberts, C.J., concurring in the judgment) (noting that the majority "decision is grounded in unusual facts that necessarily limit its reach" in case involving procedural default question).

This Court's grant in *Walker v. Martin*, No. 09-996, reflects the need for additional guidance in this area. But *Walker* by itself again will not provide a complete vehicle for the Court to consider the full contours of the

---

[6] Petition for Writ of Certiorari at 6, Walker v. Martin, No. 09-996 (U.S. Feb. 17, 2010) [hereinafter *Walker* Pet.]; *see also* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petition for Writ of Certiorari at 9-10, Walker v. Martin, No. 09-996 (U.S. Mar. 24, 2010) ("This Court's jurisprudence of 'adequate state grounds' has been plagued by imprecise language . . . . *Kindler* took a step in the right direction . . . . However, the step was small and the holding narrow. A larger step is sorely needed." (citations omitted)).

problems confounding lower courts. The present case, by contrast, would afford the Court the opportunity to address numerous conflicts and add clarity to important and recurring questions. *See* Pet. at 12-32. Beyond that, this case would serve as a fitting companion and corollary to the issues at stake in *Walker*.

II. THIS CASE IS AN IDEAL COMPANION TO *WALKER v. MARTIN*

"The rule that an adequate state procedural ground can bar federal review of a constitutional claim has always been 'about federalism,' for it respects state rules of procedure while ensuring that they do not discriminate against federal rights." *Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)). As such, the doctrine "must be measured in the tension that exists between the interest in protecting federal rights and the potentially conflicting interests of state courts in adhering to their own procedures." 16B Wright et al., *supra*, § 4027. Defining the parameters of the adequacy inquiry thus requires "a proper constitutional balance" of the state and federal interests at stake. *Kindler*, 130 S. Ct. at 620 (Kennedy, J., concurring).

Whereas the State in *Walker* presents one side of the federalism scale, this case presents the counterbalance necessary to provide complete guidance on the adequacy doctrine.

A. *Walker* Presents Only One Side of the State-Federal Balance Needed to Clarify the Adequate State Ground Doctrine

1. The State in *Walker* urges the Court to rework the adequate state ground doctrine based on the apparent premise that there are few, if any, legitimate federal interests justifying federal review of state procedural bars. In *Walker*, the California courts denied a prisoner's state habeas corpus petition filed five years after his conviction on the ground that the prisoner failed to satisfy the State's judge-made, discretionary rule that habeas petitions must be filed without "substantial delay." *See Martin v. Walker*, 357 F. App'x 793, 794 (9th Cir. 2009). The Ninth Circuit held that the State's timeliness rule was "inadequate" to bar federal habeas review because the rule had not been "firmly defined" by California courts, and because the State had "not met its burden of proof of showing that the standard is consistently applied." *Id.*

In seeking review in this Court, the State invoked the principles of "state sovereignty," "federalism," and "comity." *E.g.*, *Walker* Pet. at 5-9. It argued broadly that federal "review for discretionary or inconsistent enforcement of state procedural rules is wasteful and unreliable," *id.* at 5, and constitutes "untenable second-guessing of the state courts on state-law questions." *Id.* at 8. The proper approach to the adequacy inquiry, the State argued, was for federal courts to give virtually unfettered deference to state rules and state

interpretation of state rules. *See id.* at 5-6, 8-17.[7] Under this proposed deferential standard, the State argued that the Ninth Circuit's decision was an "affront to notions of federalism and comity." *Id.* at 7. Given the lack of clarity surrounding the adequacy inquiry, the State urged the Court to accept review to reverse the Ninth Circuit and "provide broad guidance" on these federalism concerns. *Id.* at 6, 17.

2. Given its context, the State in *Walker* did not address—or even acknowledge—that "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting)). The adequacy of a state procedural bar, therefore, must be measured not just in terms of a state's interest in adhering to its own procedures, but also against the legitimate federal interest in ensuring that state rules do not arbitrarily discriminate against the protection of important federal rights. 16B Wright et al., *supra*, § 4027. As Justice Holmes explained, "[w]hatever springes the State may set for those who are endeavoring to assert rights that

---

[7] Other states in the past have made similar arguments. *See* Brief of *Amici Curiae* States of California [and Twenty-five Other States] in Support of Petitioner at 5-11, Beard v. Kindler, 130 S. Ct. 612 (2009) (No. 08-992) (arguing that federal courts should accept state procedural default rules as "adequate" except in "rare cases"); *id.* at 12-27 (arguing that there is no sufficient federal interest in reviewing "inconsistency" of state rules, that federal review is "wasteful," and "entangles the federal court in untenable second-guessing of state-law rulings").

the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Recognizing the substantial federal interest side of the balance, this Court repeatedly has found state procedural rules inadequate to bar review of federal claims. The Court, for instance, has found that habeas review may not be denied where state rules fail to provide fair notice or are arbitrary, inconsistent, or unpredictable in application: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)); *accord Kindler*, 130 S. Ct. at 619 (Kennedy, J., concurring) (quoting same).

The Court also has "been mindful of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard." *Kindler*, 130 S. Ct. at 619 (Kennedy, J., concurring) (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964)); *accord Ford*, 498 U.S. at 424 (citing same).

Indeed, the Court has recognized that—even when a state rule is sound—there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop

consideration of a federal question." *Lee*, 534 U.S. at 376 (due process challenge to trial court's denial of oral request for continuance was not procedurally barred where state rule firmly required such motions to be in writing and accompanied by affidavit).

Any "broad guidance," *Walker* Pet. at 6, 17, on the adequate state ground doctrine, then, should take into account not just state sovereignty concerns, but also legitimate federal interests that are not the focal point of the State's petition in *Walker*. Granting review in this case as a companion to *Walker* would allow the Court to do just that.

B. The Federal Interests in this Death Penalty Case Are Substantial, Making It a Fitting Companion to *Walker*

Whereas the State in *Walker* portrays a doctrine that tramples state interests, this case underscores why the adequacy doctrine is needed to ensure that capricious application of state procedural rules does not discriminate against substantial federal rights.

1. The circumstances in this case facially call out for scrutiny of the Alabama courts' treatment of Maples and puzzling construction of their own procedural rules. *See* Pet. App. at 222a-237a. While the prisoner in *Walker* waited five years to file his habeas petition, Maples sought relief as soon as he learned that his petition had been denied, and his delay seemed to fall squarely within the plain terms of a written criminal procedure rule. Alabama Rule of Criminal Procedure 32.1(f) provides that a petitioner may obtain relief where the failure to

timely appeal "was without fault on the *petitioner's* part." Ala. R. Crim. P. 32.1(f) (emphasis added)..

Nowhere does that rule state or give notice that an error of counsel is imputed to the petitioner. By contrast, the immediately preceding paragraph, Rule 32.1(e), denies relief based on evidence known *either* by "the petitioner *or* the petitioner's counsel" at the time of trial or sentencing. Ala. R. Crim. P. 32.1(e) (emphasis added). Rule 32.1(e) thus gives petitioners explicit notice of an instance where an error of counsel will be imputed to the petitioner.[8] The Alabama courts, however, read into Rule 32.1(f) an additional implied imputation hurdle that appears nowhere in the rule's text.

Not surprisingly, therefore, consistent with the language and obvious purpose of the Rule, no case prior to the rulings against Maples had held that a lawyer's failure to file a timely appeal is the "fault" of "the petitioner" under Rule 32.1(f). To the contrary, as the dissent below noted, Alabama courts had permitted an out-of-time appeal on "indistinguishable facts." Pet App. at 30a (discussing the *Marshall* case). Further, Alabama courts repeatedly had permitted out-of-time appeals for *pro se* defendants—who (unlike Maples) had no reason to justifiably rely on counsel to monitor their cases—where the court clerk failed to give them notice of

[8] The differing treatments in the two rules makes sense. When counsel knows of evidence and does not use it at trial, as implicated in Rule 32.1(e), the likelihood is that counsel has made a tactical decision that is attributable to the defendant. *New York v. Hill*, 528 U.S. 110, 114-15 (2000). By contrast, there are no tactical reasons to miss the deadline to appeal implicated in Rule 32.1(f).

adverse decisions. *See Ex parte Miles*, 841 So. 2d 242, 244-45 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195, 1196-97 (Ala. 2001); *Ex parte Robinson*, 865 So. 2d 1250, 1251-52 (Ala. Crim. App. 2003) (per curiam).

Thus, the Alabama courts ignored the plain language and structure of a procedural rule and precedent to deny Maples the ability to assert on the merits what the dissent below recognized were serious constitutional claims. Pet. App. at 31a n.3.

2. The present case, moreover, would allow this Court to consider the full contours of the adequacy inquiry in a situation where the federal interests are paramount: unlike *Walker*, this is a death penalty case. Despite common perceptions that habeas petitions are frivolous, the success rate in capital habeas cases heard on the merits is quite high. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) ("a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings"); Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 51 (2007) [hereinafter King Report] (about 1 in 8 habeas petitions filed in capital cases received relief); James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* 4 (2000) (roughly 40% (237 of 599) of capital sentences imposed between 1973 and 1995 reviewed in a first habeas petition overturned due to "serious error").[9]

---

[9] The King Report suggested lower success rates for non-capital habeas petitions, like *Walker*, but recent reports argue that the King Report vastly underestimates the non-capital (Cont'd)

More generally, according to Department of Justice statistics, between 1973 and 2005, courts overturned 2,702 death convictions or sentences, which represents 35.3% of the total number of capital cases. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2005* 16 app. tbl. 4 (2006) [hereinafter DOJ *Capital Punishment 2005*], *available at* http://bjs.ojp.usdoj. gov/content/pub/pdf/cp05.pdf.[10]

Review of the merits of state capital convictions, therefore, is of vital importance to ensure the public's confidence in the integrity of the death penalty. Nevertheless, many federal constitutional errors, like the ones here, are never considered by federal courts because of a state's procedural default rule. A recent study commissioned by the Department of Justice found

---

(Cont'd)
success rate. *See* John H. Blume et al., *In Defense of Non-capital Habeas: A Response to Hoffman and King* 18 & n.85 (Cornell Law Faculty Working Papers, Paper No. 66, 2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops_papers.

[10] More recent statistics do not segregate the cases in which the conviction or sentence has been overturned, but appear consistent with the DOJ *Capital Punishment 2005* report. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2008 - Statistical Tables* 13 tbl. 10 (2009) [hereinafter DOJ *Capital Punishment 2008*], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp08st.pdf (reporting that between 1977 and 2008, 3,315 "persons [were] removed from a sentence of death because of statutes struck down on appeal, sentences or convictions vacated, commutations, or death by other than execution," which represents 43.3% of the total number of death sentences).

that 42% of death penalty cases included a federal court ruling that at least one claim was barred under state procedural default rules. King Report, *supra*, at 48; *accord* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 350 (2006) ("in death penalty cases, the great majority of substantive claims alleging constitutional violations . . . are procedurally barred").

3. These considerations are amplified in the State of Alabama. Alabama has the fifth largest death row population of all the states. *See* DOJ *Capital Punishment 2008*, *supra*, at 7 tbl. 4; *see also* NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Winter 2010*, at 35-36 (2010). When accounting for population, Alabama has more death row inmates per capita than any other state.[11]

---

[11] According to the most recent Department of Justice statistics, Alabama had 205 prisoners on death row, giving it the fifth largest death row population of the states as of year-end 2008. *See* DOJ *Capital Punishment 2008*, *supra*, at 7 tbl. 4. Only California, Florida, Texas, and Pennsylvania had more prisoners under sentence of death. *Id.* (CA, 669; FL, 390; TX, 354; PA, 223). Accounting for total state population, however, Alabama has the most prisoners on death row per capita. According to the U.S. Census Bureau, Alabama had 4,677,464 residents as of 2008, while California, Florida, Texas, and Pennsylvania all had much larger populations. U.S. Census Bureau, *Table 1: Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009* (2009), http://www.census.gov/popest/states/NST-ann-est.html. Dividing the number of Alabama's death row inmates as of 2008 by its July 2008 population reveals that 4.4

(Cont'd)

According to Justice Department statistics, of the cases where claims were considered on the merits, 33% of death convictions or sentences in Alabama have been overturned. *See* DOJ *Capital Punishment 2005*, *supra*, at 16 app. tbl. 4 (123 of 368 sentences or convictions from 1973 to 2005 overturned; 2 sentences commuted). Another study determined that state and federal courts found "serious error" in 77% of Alabama capital cases between 1973 and 1995. Liebman et al., *supra*, at 74. But those cases involved the few who managed to be heard on the merits.

Alabama's system of capital punishment has been widely reported as "broken" and repeatedly has been singled out as failing to provide meaningful trial and post-conviction protections in death penalty cases. *See generally* American Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* iii (2006) [hereinafter ABA Report] (noting that Alabama's approach to indigent defense "leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable."); American Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama* 1 (2005) [hereinafter ACLU Report] ("The structure of the state's criminal justice system and the power given to its trial and appellate judges compromise and limit the ability of capital defendants to get a fair trial and appropriate sentencing.").

(Cont'd)
out of every 100,000 people in Alabama are on death row. *See id.* By contrast, California has 1.8 for every 100,000; Florida 2.1 per 100,000; Texas 1.5 per 100,000; and Pennsylvania 1.8 per 100,000.

Alabama is one of the few death penalty states that does not provide counsel to inmates on death row. *See* ABA Report, *supra*, at iv ("With one exception, Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings."); *accord* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1089-90 (2006) ("The current leading example is Alabama, which has no system at all for providing prefiling assistance to capital prisoners wishing to pursue postconviction actions, known locally as Rule 32 proceedings." (footnotes omitted)).

As a result, "Alabama prisoners are at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts," Freedman, *supra*, at 1090, further raising the specter that serious constitutional claims will never be heard on the merits or that underfunded and inexperienced appointed lawyers or out-of-state *pro bono* counsel may fall into procedural traps for the unwary. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts* 74 (1994) ("Of the procedural defaults where representation was known, 82 percent of the petitions in state courts and 91 percent of the petitions in federal courts were filed without benefit of counsel.").

Over the past decade, Alabama lawyers reportedly have been loathe to take a death penalty appointment because of the notoriously low pay and lack of funding

to adequately defend the cases.[12] For cost and other reasons, private firms likewise reportedly have been increasingly reluctant to take capital cases on a *pro bono* basis.[13]

Alabama is also one of only four states that allow a trial judge to override a jury's recommended sentence and impose a different one. *See* Ala. Code § 13A-5-47(d)-(e); ABA Report, *supra*, at v, 228. "Further complicating the issue, Alabama is the only state with such override that selects its judges in partisan elections." ABA Report, *supra*, at v; *see also id.* at 226, 228 (providing examples of Alabama judicial candidates touting their law-and-order stance on the death penalty and noting that "a study of judicial override in Alabama found that trial judges use life to death overrides more than twice as often in the twelve months before a judicial election than in the years between elections"). It is thus striking

---

[12] Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. Times, Mar. 1, 2000 (chronicling the story of an Alabama lawyer who said he would go to jail before accepting another death penalty appointment because the State provides insufficient pay and expenses for experts to properly defend the cases); *accord* ACLU Report, *supra*, at 5-7 (noting low fees and no expenses for appointed lawyers in Alabama and that a large number of Alabama death row inmates lack any counsel).

[13] Crystal Nix Hines, *Lack of Lawyers Blocking Appeals in Capital Cases*, N.Y. Times, July 5, 2001 (reporting that "private law firms are increasingly unwilling to take on burdensome, expensive and emotionally wrenching capital cases" and that "[t]he shortage of counsel to help death row inmates file state appeals and federal habeas corpus petitions . . . places them at risk of missing crucial filing deadlines").

that "90% of overrides in Alabama are used to impose sentences of death." *Id.* at v (noting "[t]here are at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation for a life without parole sentence"); *see also* ACLU Report, *supra*, at 15 (noting modern history of overrides and that in 54 of 57 overrides Alabama judges changed a jury life sentence to a sentence of death). By contrast, "in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life." ABA Report, *supra*, at v.

"Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." *Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting) (citations omitted). The risk of that type of political pressure undoubtedly is magnified when the question is whether to allow a defendant already sentenced to death to fall within an exception to a procedural rule that may otherwise completely bar post-conviction review of federal constitutional claims.

C. *Walker* and this Case Provide the Best Context in Which to Balance the Competing State and Federal Interests Over Which Party Bears the Burden of Proving Adequacy

1. In tandem, *Walker* and this case also present complementary contexts for resolving the conflict over which party bears the burden of proving the adequacy or inadequacy of a state procedural bar. Whereas the

Ninth Circuit in *Walker* properly placed the burden of proving that the California rule was adequate on the State, *see Walker* Pet. at 7, the Eleventh Circuit below placed the burden on Maples. *See* Pet. at 19-20.[14]

At its most basic, the question of burden allocation boils down to how much deference federal habeas courts should give states in the adequacy inquiry. In all respects, the Eleventh Circuit below gave Alabama far too much deference. As petitioner notes, the Eleventh Circuit engaged in a "*post hoc* effort to pigeonhole Alabama cases into its own newly-invented tripartite framework" thereby "manufactur[ing] a firmly established and regularly followed default rule." Pet. at 17. Beyond that, the court of appeals went so far as to ignore its own precedent allowing "an equitable exception" to the procedural default here. *See Siebert v. Allen*, 455 F.3d 1269, 1272 (11th Cir. 2006). The court below previously had recognized that a default is excused if "some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (quotation source and marks omitted). That was unquestionably the case here where no one disputes that Maples bears no fault for the missed deadline, and the State did nothing when it learned that

---

[14] *Compare Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010) (burden on the state), *with Paredes v. Quarterman*, 574 F.3d 281, 289 (5th Cir. 2009) ("Where a state court asserts a procedural bar, we presume that obstacle is adequate and independent, but the petitioner can overcome that presumption by showing that state courts do not strictly or regularly follow the rule." (quotation source and marks omitted)).

that Maples's *pro bono* lawyers never received the notice that started the clock for his appeal.

In this regard, the divided Eleventh Circuit's deferential lens appears consistent with reports concerning the court's past practice. The Eleventh Circuit in recent years reportedly has denied substantive relief in twenty-two of twenty-four death penalty cases, each time "because many of the constitutional violations raised by condemned prisoners were deemed procedurally barred." Stevenson, *supra*, at 351; *cf. Holland v. Florida*, 130 S. Ct. 2549, 2559-60, 2565 (2010) (rejecting Eleventh Circuit's "overly rigid *per se* approach" to equitable tolling under which attorney gross negligence could never permit equitable tolling to missed deadlines in death penalty cases).

Likewise, even for non-capital cases the Eleventh Circuit's approach to procedural default appears out-of-step with other circuits. Whereas some datasets reflect that non-capital habeas petitioners won on the merits in the Fifth and Sixth Circuits at rates of 21.73% and 22.85%, respectively, the success rate in the Eleventh Circuit was 1.66%. Blume et al., *supra*, at 18-19 n.86.

2. At the other end of the spectrum, in *Walker* the State criticized the Ninth Circuit for giving insufficient deference to California procedural rules, calling the court's approach "an affront to notions of federalism and comity." *Walker* Pet. at 7. To the State there, in all but the rarest cases any adequacy review of state rules is "wasteful and unreliable" and leads to "untenable second-guessing of the state courts on state-law questions." *Id.* at 5, 8.

Together, these cases present the ideal context in which to weigh the critically important question of how much deference is due to a state in the adequacy inquiry. If the Ninth Circuit in *Walker* supposedly "nullified" any state procedural bar from ever precluding federal habeas review, *Walker* Pet. at 7, then the Eleventh Circuit in this case stripped the adequacy requirement of all its force in preventing state discrimination against federal rights.

D. This Case Provides Much Needed Context to *Walker* to Enable the Careful Calibration of the Boundaries of State Case-Law-Based Interpretation of Timeliness Rules

1. Beyond the federalism considerations, granting review of this case would present the Court with a fuller context in which to provide "broad guidance on the adequate state ground doctrine." *Kindler*, 130 S. Ct. at 619. The Court repeatedly has noted the limited contexts of its prior rulings in this area. This case, together with *Walker*, better captures the range of circumstances where the adequacy inquiry is applied.

Walker concerns a judge-made, overtly discretionary habeas corpus timeliness rule. Most states, however, do not appear to employ judge-made, purely discretionary time bar rules; instead, as the State in *Walker* appeared to recognize, Reply to Brief in Opposition at 2-4, Walker v. Martin, No. 09-996 (U.S. May 27, 2010), states often have written rule-based or statutory deadlines that incorporate discretionary exceptions or components.

The Alabama rules at issue here are more akin to the typical timing provisions because they are written, but give room for discretion in the determination of whether a failure to meet the deadline was "without fault." *See* Ala. R. Crim. P. 32.1(f). And while the extent of a court's discretion is not at issue here—since all agree that Maples was "without fault"—this case still presents a complementary context to clarify the adequacy of a written rule that was applied in a capricious manner, which otherwise may elude consideration in *Walker*, as it did in *Kindler*. *See Bostick v. Stevenson*, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("In *Kindler*, the Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily." (citations omitted)).

Further, in *Walker*, the Ninth Circuit based its inadequacy determination principally on the state courts' lack of case law sufficiently defining the judge-made default rule. 357 F. App'x at 794. This case involves a procedural rule that on its face authorized the out-of-time appeal, but was interpreted by Alabama judges in a manner contrary to its text and prior Alabama state case law. In this regard, this case provides the best vehicle to address concerns raised by Justices of this Court in *Kindler* about the need for further guidance on the level of specificity or consistency that an evolving body of state case law must provide in order to establish an adequate default rule. *Kindler*, 130 S. Ct. at 620 (Kennedy, J., joined by Thomas, J., concurring) (observing that standard relating to the state "case process" and "case law decisional dynamic" should be addressed).

2. The unbalanced framework the State will pursue in *Walker* further reflects why this case would be an apt companion. As reflected in its petition, the State argues that discretionary state procedural rules are effectively *per se* adequate: "This Court's recognition in *Kindler* of the legitimacy of discretion-based rules . . . necessarily leads to the conclusion that federal courts should not second-guess . . . discretionary procedural rulings." *Walker* Reply at 1. Any consideration of such a wholly deferential standard for the adequacy inquiry would benefit from seeing how it would apply in other contexts such as here, a death penalty case where state judges interpreted a procedural bar facially at odds with a written rule's text and prior case law construing the timeliness provision.

* * *

Last term, this Court reiterated that "the writ of habeas corpus plays a vital role in protecting constitutional rights." *Holland*, 130 S. Ct. 2562 (quotation source and marks omitted). "[I]t is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Lonchar v. Thomas*, 517 U.S. 314, 330 (1996). That is even more the case when a man's life is at stake. As different sides of the same doctrinal coin, reviewing *Walker* and this case together would provide the complete framework to clarify the standards for the adequacy inquiry. This Court should grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
MICHAEL TYE
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 18 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

LUTHER STRANGE
Attorney General
JOHN C. NEIMAN, JR.
Solicitor General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2187
jneiman@ago.state.al.us
Counsel for Respondent

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

PETITION FOR CERTIORARI FILED JULY 9, 2010
CERTIORARI GRANTED MARCH 21, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States Court of Appeals for the Eleventh Circuit Relevant Docket Entries: *Maples v. Allen*, Case No. 07-15187-P JA-1

United States District Court for the Northern District of Alabama Relevant Docket Entries: *Maples v. Campbell*, Case No. 5:03-cv-02399-SLB-PWG JA-7

Relevant Pleadings and Opinions Not Previously Reproduced (Chronologically Arranged):

Opinion on Direct Appeal, *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. Mar. 26, 1999) (excerpt) JA-13

Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Maples v. State*, No. CC 95-842.60 (Ala. Cir. Aug. 1, 2001) (excerpt) JA-22

State of Alabama's Answer to Maples's Petition for Relief Pursuant to Rule 32, ARCrP \ State's Motion to Dismiss or Deny Claims Presented Under Rule 32, ARCrP, *Maples v. State*, No. CC 95-842.60 (Ala. Cir. Sept. 27, 2001) (excerpt) JA-25

TABLE OF CONTENTS—Continued

Page

Amended and Restated Petition for Relief from Judgment Pursuant to Rule 32, *Maples v. State*, No. CC 95-842.60 (Ala. Cir. Dec. 7, 2001) JA-28

Order Denying Maples's Rule 32 Relief, *Maples v. State*, No. CC 95-842.60 (Ala. Cir. May 22, 2003) JA-146

Petition for Writ of Habeas Corpus by Prisoner in State Custody Under Death Sentence, *Maples v. Campbell*, No. CV-03-B-2399-NE (N.D. Ala. Aug. 29, 2003) (excerpt) JA-226

Motion for Admission *Pro Hac Vice* of Felice Duffy, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. Sept. 12, 2003) (excerpt) JA-231

Motion for Admission *Pro Hac Vice* of Marc de Leeuw, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. Sept. 12, 2003) (excerpt) JA-233

Petition for a Writ of Mandamus, *Maples v. State*, No. CC 95-842.60 (Ala. Crim. App. Oct. 8, 2003) (excerpt) JA-235

TABLE OF CONTENTS—Continued

Page

Cory R. Maples's Petition for Writ of Mandamus to the Circuit Court of Morgan County, Alabama, *Ex parte Cory R. Maples*, No. CR-03-0021 (Ala. Feb. 6, 2004) (excerpt) JA-237

Leave to File Exhibits, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. Nov. 9, 2004) JA-239

Petition for a Writ of Certiorari, *Maples v. State*, No. 04-765 (U.S. Dec. 2, 2004) (excerpt) JA-241

Order on Cory R. Maples's Second Petition for Writ of Habeas Corpus, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. Mar. 9, 2005) JA-243

Petitioner's Memorandum attached to Certification of Kathy E. Brewer, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. Apr. 8, 2005) JA-252

Amended Petition for Writ of Habeas Corpus By Prisoner in State Custody Under Death Sentence, *Maples v. Campbell*, No. CV 03-B-2399-NE (N.D. Ala. May 23, 2005) JA-255

TABLE OF CONTENTS—Continued

Page

Cory Maples' Reply Brief and Request for an Evidentiary Hearing Pursuant to March 9, 2005 Order, *Maples v. Campbell*, No. CV-03-B-2399-NE (N.D. Ala. Dec. 19, 2005) (excerpt) JA-260

Cory Maples' Motion to Alter or Amend the Judgment Pursuant to Federal Rule of Civil Procedure 59(e), *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Oct. 16, 2006) (excerpt) JA-265

Cory Maples' Application for a Certificate of Appealability, *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Oct. 26, 2007) (excerpt) JA-268

Brief of Cory R. Maples, *Maples v. Allen*, No. 07-15187-P (11th Cir. Sept. 24, 2008) (excerpt) JA-271

Brief of Respondent-Appellee, *Maples v. Allen*, No. 07-15187-P (11th Cir. Dec. 11, 2008) (excerpt) JA-280

Reply Brief of Cory R. Maples, *Maples v. Allen*, No. 07-15187-P (11th Cir. Feb. 2, 2009) (excerpt) JA-283

Other Record Materials:

Trial Transcript and Exhibits from Trial Proceedings held October 20-31, 1997

TABLE OF CONTENTS—Continued

Page

Voluntary Statement (Under Arrest) by Cory Ross Maples, dated Aug. 2, 1995 (Trial Ex. 233) JA-289

Defendant's Closing Statement, Trial Transcript (excerpt) JA-293

Transcript of Oral Argument, *Maples v. Allen*, No. 07-15187 (11th Cir. May 18, 2009) JA-297

Relevant Alabama Rules:

Rules Governing Admission to the Alabama State Bar, Rule VII. Admission of Foreign Attorneys Pro Hac Vice (1998) JA-364

Rules Governing Admission to the Alabama State Bar, Rule VII. Admission of Foreign Attorneys Pro Hac Vice (2008) (excerpt) JA-373

Order Amending Rule VII Governing Admission to the Alabama State Bar and Appendix C thereto (Ala. Sept. 19, 2006) (excerpt) JA-376

TABLE OF CONTENTS—Continued

Page

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the Appendix to Petition for Writ of Certiorari filed on July 9, 2010 by Petitioners in Case No. 10-63.

Opinion of the United States Court of Appeals for the Eleventh Circuit, *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009) 1a

Memorandum of Opinion of the United States District Court for the Northern District of Alabama, *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Sept. 29, 2006) 33a

Memorandum Opinion and Order of the United States District Court for the Northern District of Alabama Denying Reconsideration Under Rule 59(e), *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. Sept. 26, 2007) 203a

Order of the United States Court of Appeals for the Eleventh Circuit Granting Leave to Expand Certificate of Appealability, *Maples v. Allen*, No. 07-15187-P (11th Cir. Aug. 15, 2008) 219a

TABLE OF CONTENTS—Continued

Page

Order of the United States District Court for the Northern District of Alabama Granting Certificate of Appealability, *Maples v. Campbell*, No. 5:03-CV-2399-SLB-PWG (N.D. Ala. July 3, 2008) 220a

Order of the Circuit Court of Morgan County of Alabama Denying Motion to Reissue May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Sept. 3, 2003) 222a

Order of the Court of Criminal Appeals of Alabama Denying Petition for Writ of Mandamus, *Ex parte Maples*, No. CR-03-0021 (Ala. Crim. App. Jan. 23, 2004) 226a

Order of the Supreme Court of Alabama Denying Petition for Writ of Mandamus, *Ex parte Maples*, No. 1030701 (Ala. Sept. 3, 2004) 237a

Order of the United States Court of Appeals for the Eleventh Circuit Denying Rehearing, *Maples v. Allen*, No. 07-15187-P (11th Cir. Feb. 9, 2010) 238a

Letter concerning Extension of Time for Filing Petition for Writ of Certiorari, *Maples v. Allen*, Application No. 09A974 (U.S. Apr. 19, 2010) 240a

TABLE OF CONTENTS—Continued

Page

U.S. Constitution amendment VI 242a

U.S. Constitution amendment XIV, § 1 ..... 243a

28 U.S.C. § 2254 ..... 244a

Alabama Rule of Criminal Procedure 1.2 ..... 248a

Alabama Rule of Criminal Procedure 32.1 (1990) 249a

Alabama Rule of Appellate Procedure 4(a)(1) 251a

Letter from State of Alabama Office of Attorney General to Cory R. Maples regarding expiration of right to appeal to the Alabama Court of Criminal Appeals, *Maples v. State*, No. CC-95-84260 (Aug. 13, 2003) 253a

Affidavit of John G. Butler, attachment to Motion to Reissue Court's May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Aug. 26, 2003) 255a

Affidavit of Marc de Leeuw, attachment to Motion to Reissue Court's May 22, 2003 Order Denying Cory R. Maples's Rule 32 Petition, *Maples v. State of Alabama*, No. CC95-842.60 (Ala. Cir. Aug. 26, 2003) 257a

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Eleventh Circuit
***Maples v. Allen*, Case No. 07-15187-P**

Entry Date	Date 2	Docket Entry	Party
11/06/07	/ /	Probable Jurisdiction Noted	
		* * *	
07/09/08	07/03/08	DC Order: COA Granted in Part & Denied in Part	Maples, Cory R.
		* * *	
07/17/08	/ /	Appellant's Motion to Expand Certificate of Appealability: (Atty: Marc De Leeuw)	Maples, Cory R.
		* * *	
08/15/08	/ /	Appellant's Motion to Expand Certificate of Appealability is GRANTED. RB	
		* * *	

09/25/08	09/24/08	Record Excerpts: 2 volumes (Atty: Marc De Leeuw)	Maples, Cory R.
09/25/08	09/24/08	Appellant Brief Filed: M:11/6 pt'd for 2 more copies (Atty: Marc De Leeuw)	Maples, Cory R.
		* * *	
12/15/08	12/11/08	Appellee Brief Filed: (Atty: Corey Landon Maze)	Allen, Richard F.
		* * *	
01/06/09	/ /	Record on Appeal (4 vols contained in 1 box)	
01/06/09	/ /	Exhibits (2 boxes)	
02/02/09	02/02/09	Reply Brief Filed: (Atty: Marc De Leeuw)	Maples, Cory R.
		* * *	
05/18/09	/ /	Marc De Leeuw argued for Appellant; Corey Landon Maze argued for Appellee	

05/18/09	//	Oral Argument Scheduled: Special Panel: 05/18/09	
10/26/09	//	Judgment Entered	
		* * *	
10/26/09	//	Opinion Issued	
		* * *	
11/05/09	//	Appellant's Unopposed Motion for Extension to File Petition for Rehearing and/or Rehearing En Banc Until 12/16/09 is GRANTED. RB	
		* * *	
12/16/09	12/16/09	Petition for Rehearing En Banc: (Atty: Gregory G. Garre)	Maples, Cory R.
		* * *	
01/07/10	//	Given that all motions represent that Appellee has consented, the Court GRANTS all 12/28/09 Motions to File Amicus Briefs. FMH	

* * *

01/07/10	12/23/09	Amicus Brief in Support of Rehearing Petition: (Atty: Jonathan Saul Franklin)	Constitution Project,
01/07/10	12/23/09	Amicus Brief in Support of Rehearing Petition: (Atty: Christine A. Freeman)	Alabama Criminal Defense
01/07/10	12/24/09	Amicus Brief in Support of Rehearing Petition: (Atty: Danielle Garten)	National Association of

* * *

01/12/10	01/12/10	Appellee's Motion to Review Oral Argument Recording and/or Transcript: (Atty: Corey Landon Maze)	Allen, Richard F.

* * *

01/20/10	01/20/10	Response to Motion to Review Oral Argument Recording and/or Transcript.: (Atty: Corey Landon	Maples, Cory R.

		Maze): (Atty: Gregory G. Garre)
01/25/10	//	Appellee's Motion to Review Oral Argument Recording and/or Transcript is GRANTED. (see file for complete text) FMH
		* * *
02/05/10	//	Transcript of the Oral Argument Hearing
02/09/10	//	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.
		* * *
02/09/10	//	The Court Sua Sponte modifies order dated 1/25/10, to provide that there will be only 1

		copy of the OA transcript kept in the CO in ATL. After payment, the Clerk will provide Appe & Aplt a copy. No parties shall make copies... FMH	
02/17/10	02/16/10	MDT1 (Letter issuing mandate) issued. To:Sharon Harris; c:Corey Landon Maze; c:Gregory G. Garre; c:Marc De Leeuw	
		* * *	
03/21/11	03/21/11	Certiorari Granted limited to Question 2 presented by the petition (SC # 10-63).: (Atty: Gregory G. Garre)	Maples, Cory R.

RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of Alabama (Northeastern)
***Maples v. Cambell*, Case No. 5:03-cv-02399-SLB-PWG**

Date Filed	#	Docket Text
08/29/2003	1	PETITION for Writ of Habeas Corpus filed (referred to Magistrate-Judge Paul W. Greene) (KAM) (Entered: 08/29/2003)
		* * *
09/12/2003	3	MOTION by petitioner for attorney Marc De Leeuw to appear pro hac vice filed cs (KAM) (Entered: 09/15/2003)
09/12/2003	4	MOTION by petitioner Cory R Maples for attorney Felice Duffy to appear pro hac vice filed cs (KAM) (Entered: 09/15/2003)
09/23/2003	5	ORDER granting motion for attorney Felice Duffy to appear pro hac vice [4-1], granting motion for attorney Marc De Leeuw to appear pro hac vice [3-1], granting motion for attorney Gary Alexion to appear pro hac vice [2-1] upon payment of fees filed (by Magistrate-Judge Paul W.

		Greene) cm (KAM) (Entered: 09/23/2003)
		* * *
12/03/2003	7	ORDER granting motion to stay case pending resolution of petition for writ of mandamus in state court [6-1] filed (by Magistrate-Judge Paul W. Greene) cm (KAM) (Entered: 12/03/2003)
		* * *
11/09/2004	13	MOTION by petitioner Cory R Maples for leave to file exhibits filed cs (KAM) (Entered: 11/10/2004)
		* * *
03/07/2005	18	Amended PETITION for Writ of Habeas Corpus , filed by Cory R Maples. (KAM,) (Entered: 03/07/2005)
03/09/2005	20	ORDER -This is a second petition for writ of habeas corpus on behalf of Cory R. Maples who has been convicted of capital murder and sentenced to death; on or before 4/15/05 counsel for pet shall certify to the court he has met with and advised him as set out;on or before 4/15/05 counsel for pet shall file with the court a memorandum

which shall affirm that conference has been completed and meets with criteria as set out; by 5/2/05 counsel for pet shall amend petition or file notice that no amendment is required;by 7/5/05 respondent shall file answer in accordance with rules governing Section 2254 cases as set out; opposing counsel shall respond within 10 days. Signed by Judge Paul W Greene on 3/9/05. (MAA,) (Entered: 03/09/2005)

* * *

04/08/2005	22	AFFIDAVIT / *Certificatin of Kathy E. Brewer* by Cory R Maples. (Attachments: # 1 # 2)(Brewer, Kathy) (Entered: 04/08/2005)

* * *

05/23/2005	24	Amended PETITION for Writ of Habeas Corpus filed by Cory R Maples. (DeLeeuw, Marc) Modified on 5/24/2005 (KAM,). (Entered: 05/23/2005)

* * *

10/04/2005	28	MOTION to Dismiss *With Prejudice and Objection to Maples's Request for a Continuance* by Donal Campbell.

		(Maze, Corey) (Entered: 10/04/2005)
10/04/2005	29	RESPONSE to Petition for Writ of Habeas Corpus *and Memorandum Brief in Support* by Donal Campbell.(Maze, Corey) (Entered: 10/04/2005)
		* * *
12/19/2005	33	REPLY Brief filed by Petitioner Cory R Maples re: 20 Order,, *and Request for Evidentiary Hearing* filed by Cory R Maples. (Attachments: # 1 Exhibits to Reply Brief)(DeLeeuw, Marc) (Entered: 12/19/2005)
09/29/2006	34	MEMORANDUM OPINION. Signed by Judge Sharon Lovelace Blackburn on 9/29/2006. (KAM,) (Entered: 09/29/2006)
09/29/2006	35	ORDER in accordance with the memo opinion, the petition for writ of habeas corpus is denied; DISMISSING CASE with prejudice. Signed by Judge Sharon Lovelace Blackburn on 9/29/2006. (KAM,) (Entered: 09/29/2006)
10/16/2006	36	MOTION to Alter Judgment by Cory R Maples. (DeLeeuw, Marc) (Entered: 10/16/2006)

09/26/2007	37	MEMORANDUM OPINION AND ORDER denying 36 Motion to Alter Judgment. Signed by Judge Sharon Lovelace Blackburn on 9/26/2007. (KAM,) (Entered: 09/26/2007)
10/26/2007	38	NOTICE OF APPEAL as to 37 Order on Motion to Alter Judgment by Cory R Maples. Filing fee $ 455. (DeLeeuw, Marc) (Entered: 10/26/2007)
10/26/2007	39	MOTION for Certificate of Appealability by Cory R Maples. (DeLeeuw, Marc) (Entered: 10/26/2007)

* * *

07/03/2008	41	ORDER granting in part and denying 39 Motion for Certificate of Appealability. Signed by Chief Judge Sharon Lovelace Blackburn on 7/3/2008. (KAM,) (Entered: 07/03/2008)

* * *

08/18/2008	43	ORDER of USCA as to 38 Notice of Appeal filed by Cory R Maples ; appellant's motion for leave to expand the certificate of appealability is granted; Barkett, USCJ (KAM,) (Entered: 08/29/2008)

* * *

02/18/2010	45	USCA JUDGMENT as to 38 Notice of Appeal filed by Cory R Maples ; Before Edmondson, Barkett and Hull, USCJ, AFFIRMING the decision of the district court w/per curiam opinion attached - Barkett dissenting - issued as mandate 2/17/2010 (KAM,) (Entered: 02/18/2010)

JA-13

Court of Criminal Appeals of Alabama

Corey MAPLES

v.

STATE.

CR-97-0548.

March 26, 1999.
Rehearing Denied May 28, 1999.

758 So. 2d 1

BASCHAB, Judge.

The appellant, Corey Maples, was convicted of two counts of capital murder for 1) the murders of Stacy Alan Terry and Barry Dewayne Robinson II pursuant to one scheme or course of conduct, § 13A-5-40(a)(10), Ala.Code 1975, and 2) the murder of Stacy Alan Terry during the course of committing a robbery, § 13A-5-40(a)(2), Ala.Code 1975. By a vote of 10-2, the jury recommended that the appellant be sentenced to death. The trial court accepted the jury's recommendation and sentenced the appellant to death.

Because the appellant does not specifically challenge the sufficiency of the evidence to support his convictions, a lengthy recitation of the evidence presented is unnecessary. However, we have reviewed all of the evidence and find that it is sufficient to support the appellant's convictions. The following

summary of the relevant facts, as prepared by the trial court, may be helpful to an understanding of this case:

> "At some time in the late evening hours of Friday, July 7, 1995, or the early morning hours of Saturday, July 8, 1995, Stacy Alan Terry, Barry Dewayne Robinson II, and the Defendant, Corey Ross Maples, arrived at the residence of the Defendant on Mud Tavern Road in Morgan County. All three of the young men were acquaintances. Mr. Terry, whose nickname was Twinky, and the Defendant had spent the evening of July 7 drinking, playing pool, and 'riding around' in Mr. Terry's 1995 Camaro. The Defendant and Mr. Terry had attended high school together until the Defendant dropped out his senior year. As evidenced by the testimony of family and friends, the two young men had spent a considerable amount of time together during the week preceding these events.
>
> "Mr. Robinson was new to the area, but had known Mr. Terry and the Defendant for several months. Mr. Robinson asked Mr. Terry for a ride home from the pool hall where all three young men were playing pool.
>
> "Once the three young men arrived at the home of the Defendant, Corey Maples, he left the car and went into the mobile home. The defendant picked up a .22 caliber rifle and walked back outside to the car where Mr. Terry and Mr. Robinson sat getting ready to leave. The Defendant walked to the driver's side of the car and shot Mr. Terry twice in the

head and then shot Mr. Robinson twice in the head.

"At some time around 1:00 a.m. on July 8, 1995, the Defendant's half-brother, Daniel Maples, and his friend, Matt Shell, arrived at the residence on Mud Tavern Road and found the body of Stacy Terry lying in the driveway close to the trailer where the Defendant and his half-brother lived with their father and the Defendant's stepmother.

"At some time around 9:00 p.m. on July 8, 1995, the Decatur police received a report of a body found in a creek commonly referred to as Mud Tavern Creek, one mile down the road from the Defendant's residence. The body was identified as that of Barry Robinson II.

"During the ensuing investigation of the two young men's murders, officers of the Morgan County Sheriff's Department obtained information that implicated Corey Ross Maples in the killings of Mr. Terry and Mr. Robinson. The officers began to look for the Defendant and Mr. Terry's missing Camaro with the personalized tag bearing the word 'TWINK.'

"In the late evening of August 1, 1995, the Nashville Metropolitan Police Department received a telephone call from an individual who had spotted the Defendant at the Best Rest Motel off I-10 in Nashville. The individual had seen a picture of the Defendant and heard a description of the car from a local television station. Members of the Nashville Police Department apprehended the Defendant at the motel. The Defendant was

then transported to the Nashville Metropolitan Police Department where he was held until members of the Morgan County Sheriff's Department arrived. During the early morning hours of August 2, 1995, the Defendant gave Investigators Howard Battles and Byron Whitten of the Morgan County Sheriff's office a statement of confession to the murders.

"Mr. Terry and Mr. Robinson died as a result of gunshot wounds to the head. Both young men were shot twice in the head. The medical examiner determined that each man's death was instantaneous to the shots to the head. The wounds were consistent with an execution-type slaying. The evidence proved beyond a reasonable doubt that the Defendant shot both men. He was armed with a .22 caliber rifle which belonged to his father.

"Evidence, both circumstantial and direct, overwhelmingly supported the foregoing finding: Count I of the indictment charged the Defendant, Corey Maples, in the killing of two people in a single transaction or occurrence as described in Ala.Code [1975,] § 13A-5-40[(a)](10)(1994 repl. vol.). Count II of the indictment charged the Defendant, Corey Maples, with the murder of Stacy Terry during the course of a robbery as described in Ala.Code [1975,] § 13A-5-40[(a)](2)(1994 repl. vol.). The jury returned a verdict of guilty on both counts of capital murder after five plus days of testimony. The Defendant was the sole participant in this brutal double murder of

> Stacy Alan Terry and Barry Dewayne Robinson II, as well as the murder of Stacy Alan Terry in the course of robbing Stacy Alan Terry of his 1995 Camaro automobile."

(C.R.554-56.) Additional facts are included, as necessary, throughout this opinion.

* * *

III.

The appellant's third argument is that the trial court erred in refusing to instruct the jury on intoxication and manslaughter because there was evidence that he was using drugs and alcohol on the day of the murders. He did not request instructions on intoxication and manslaughter, and he did not object when the trial court did not give such charges. Therefore, we review this claim for plain error. Rule 45A, Ala. R. App. P.

The legislature has defined "intoxicated" to include "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." § 13A-3-2(e)(1), Ala.Code 1975. Thus, evidence of ingestion of alcohol or drugs, standing alone, is insufficient to support a charge on intoxication. In addition, there must be evidence that the ingestion caused a disturbance of the person's mental or physical capacities and that that mental or physical disturbance existed *at the time the offense was committed.* This interpretation is borne out by our decision in *Windsor v. State*, 683 So.2d 1027 (Ala.Cr.App.1994), aff'd, 683 So.2d 1042 (Ala.1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997), in which we held:

> "In this case, however, there was no evidence that the appellant was intoxicated. Although there was evidence that the appellant had been drinking beer on the day of the robbery-murder, there was no evidence concerning the quantity of beer he consumed that day at the time of the murder. *Evidence that someone was drinking an alcoholic beverage is not evidence that that person was intoxicated.* There was no 'reasonable theory' to support an instruction on intoxication because there was no evidence of intoxication. The court did not err in not instructing the jury on intoxication and manslaughter where there was no evidence that the appellant was intoxicated at the time the robbery-murder occurred."

683 So.2d at 1037 (emphasis added). Furthermore, instructions on intoxication and manslaughter are not required when they would be inconsistent with the defense strategy. As we held in *Hunt v. State*, 659 So.2d 933 (Ala.Cr.App.1994), aff'd, 659 So.2d 960 (Ala.), cert. denied, 516 U.S. 880, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995):

> "The appellant contends that the trial court erred in failing to instruct the jury on voluntary intoxication.
>
> "In his oral instructions to the jury, the trial judge instructed the jury on intentional murder and felony murder as lesser included offenses of the capital crimes charged in the indictment. Defense counsel raised no objection to those particular portions of the oral charge and, on one occasion, announced 'satisfied.' R. 881, 882, 888. The trial judge

repeatedly instructed the jury on the definition of intent and the requirement that the killing have been intentionally committed. Although there was evidence that the appellant had consumed alcohol and drugs shortly before the murder, the trial judge was not requested to and did not instruct the jury on the legal principles of intoxication in connection with criminal liability. No objection was made at trial to the court's failure to give such an instruction.

"In *Fletcher v. State*, 621 So.2d 1010 (Ala.Cr.App.1993), the trial court did not instruct the jury on the legal principles of intoxication and this Court found that that omission constituted plain error. In *Fletcher* however, the trial judge, sua sponte, stated at the close of the State's case that he would not give a charge on intoxication because *he* '"did not get the impression from the evidence that [the defendant] was so intoxicated that he didn't know what he was doing."' 621 So.2d at 1018. We held that this determination by the trial court '"invaded the exclusive province of the jury,"' *id.* at 1021, and, under the particular facts involved, amounted to plain error.

"In contrast, in the instant case, the matter of an intoxication charge was not raised by anyone at the guilt phase of the trial. In fact, defense counsel objected to the references during the trial to the appellant's drug use and, in addition to the appellant's defense that he did not commit the murder, defense counsel

> suggested during closing argument that, at most, the evidence supported a conviction of *intentional murder* only. Thus, it appears that the appellant's defense strategy was to convince the jury either that he did not commit the murder or that the killing was intentionally done, but without sexual overtones. There was no claim that he was unable to form the intent to kill because he was intoxicated. Where, as in this case, an intoxication instruction would conflict with defense strategy, there is no plain error in the trial court's failure to give such an instruction. *Gurley v. State*, 639 So.2d 557, 560-61 (Ala.Cr.App.1993)."

659 So.2d at 957-58. Finally, under § 13A-1-9(b), Ala.Code 1975, a trial court is not required to instruct on a lesser included offense "unless there is a rational basis for a verdict convicting the defendant of the included offense."

The testimony at trial did not establish that the appellant was intoxicated at the time of the murders. Although there was some testimony that he had ingested alcohol several hours before the murders occurred, there was no testimony that he was intoxicated at the time of the murders. Also, there was no evidence that he had ingested drugs before the murders. Thus, there was no rational basis for instructions on intoxication and manslaughter under the evidence presented in this case.

Furthermore, instructions on intoxication and manslaughter would have been inconsistent with his defense strategy. At trial, the appellant specifically contended that he was not intoxicated at the time of the murders. He also contended that, at most, he was

guilty of two intentional murders, but not two counts of capital murder. Thus, the trial court did not err in not instructing the jury on intoxication and manslaughter.

* * *

IN THE CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA

CORY R. MAPLES, Petitioner,	)	
vs.	)	Case No. CC-95-842.60
STATE OF ALABAMA, Respondent.	)	

FILED
CIRCUIT COURT OF
MORGAN COUNTY, AL

'01 AUG -1 [illegible]
[illegible]

PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

Petitioner, CORY MAPLES, now incarcerated on death row at Holman State Prison in Atmore, Alabama, respectfully petitions this Court for relief from his unconstitutionally obtained conviction and death sentence. In support of this petition, Mr. Maples states the following:

* * *

PRAYER FOR RELIEF

208. For all the above stated reasons and such other reasons as may be made upon amendment of this Petition and a full evidentiary hearing, Cory Maples respectfully asks this Honorable Court to grant him the following relief:

(a) allow Mr. Maples access to the law library so that he can assist counsel in preparing for an evidentiary hearing;

(b) conduct a full and fair evidentiary hearing, that is recorded and transcribed, at which proof may be offered concerning the allegations in this petition and any other allegations raised in amendments to this petition;

(c) provide Mr. Maples, who is indigent, with the opportunity to engage in discovery and with funds sufficient to investigate the facts relating to the issues set forth herein and present witnesses, experts and other evidence in support of the allegations contained in this petition;

(d) issue an order relieving Mr. Maples of his unconstitutionally obtained conviction and death sentence following a full and complete hearing; and

(e) grant Mr. Maples any such additional relief as is just, equitable, and proper under Federal and State law.

* * *

Respectfully submitted,

s/ Jaasi Munanka
JAASI MUNANKA
CLARA INGEN-HOUSZ

c/o Sullivan & Cromwell
125 Broad Street
New York, NY 10004
212-558-3028

Counsel for Mr. Cory Maples

JOHN G. BUTLER, JR.
MacDaniel & MacDaniel
223 East Side Square
Huntsville, AL 35802

Local Counsel

Dated: July 24, 2001

* * *

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CORY R. MAPLES,	)	
	)	
Petitioner,	)	
	)	CASE NO: CC-95-842.60
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S ANSWER TO MAPLES'S PETITION FOR RELIEF PURSUANT TO RULE 32, ARCrP \ STATE'S MOTION TO DISMISS OR DENY CLAIMS PRESENTED UNDER RULE 32, ARCrP

Comes now the State of Alabama, Respondent in the above styled cause, and denies that the petitioner, Cory R. Maples, was convicted and sentenced to death in violation of his state and federal constitutional rights. Additionally, the State moves this Honorable Court to summarily dismiss Maples' petition for failing to state a claim upon which relief could be granted or establishing any material facts that would entitle Maples to relief. In the alternative, the State moves the Court to order Maples to amend his petition to comply with the specificity and full disclosure requirements of Rule 32.6(b), ARCrP. In support of this answer / motion, the State submits the following:

RESPONSE TO PROCEDURAL HISTORY

1) Paragraph one is admitted.

* * *

Respectfully submitted on September 27 2001.

BILL PRYOR
ATTORNEY GENERAL
BY—

s/ Jon B. Hayden
JON B. HAYDEN
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2001, I served a copy of the foregoing on the attorney for petitioner, by placing said copy in the United States Mail, first class, postage prepaid and addressed as follows:

Honorable Jaasi Munanka
c/o Sullivan & Crowell
125 Broad Street
New York, NY 10004

s/ Jon B. Hayden
JON B. HAYDEN

ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334) 353-3123

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CORY R. MAPLES,	)	
	)	
Petitioner,	)	
	)	CASE NO: CC 95-842.60
vs.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

AMENDED AND RESTATED PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURES

Petitioner, CORY MAPLES, now incarcerated on death row at Holman State Prison in Atmore, Alabama, respectfully petitions this Court for relief from his unconstitutionally obtained conviction and death sentence. In support of this petition, Mr. Maples states the following:

PROCEDURAL HISTORY

1. On October 30, 1997, Mr. Maples was convicted of the capital murder of Stacy Terry and Barry Robinson in violation of Ala. Code § 13A-5-40(10) (1994) (murder of two persons by one act or pursuant to one scheme or course of conduct) and Ala. Code § 13A-5-40(2) (1994) (murder during a robbery), in the Morgan County Circuit Court, Judge Glenn Thompson presiding. On the following day, October 31, 1997, the jury recommended the death penalty by a vote of 10-2.

2. On November 21, 1997, the trial court, finding one aggravating factor and one statutory mitigating factor, sentenced Mr. Maples to death.

3. Mr. Maples's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on March 26, 1999. Maples v. State, 758 So. 2d 1 (Ala. Crim. App. 1999).

4 The Alabama Supreme Court affirmed on December 10, 1999. Ex parte Maples, 758 So. 2d 81 (Ala. 1999).

5 On October 2, 2000, the United States Supreme Court denied Mr. Maples's petition for writ of certiorari. Maples v. Alabama, 531 U.S. 830 (2000).

GROUNDS SUPPORTING PETITION FOR RELIEF

I. TRIAL COUNSEL WERE INEFFECTIVE DURING THE GUILT STAGE OF MR. MAPLES'S TRIAL, AND THEREBY DEPRIVED MR. MAPLES OF HIS CONSTITUTIONAL RIGHTS.

6. Mr. Maples was denied effective legal representation during the guilt phase of his capital trial. This failure of trial counsel denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, under Article 1, § 6 of the Alabama Constitution and under Alabama law. Strickland v. Washington, 446 U.S. 668 (1984). This Court must now reverse Mr. Maples's conviction and sentence of death.

7. Mr. Maples's trial counsel, Mark Craig and Phil Mitchell[1] (collectively, "Counsel"), did not render

[1] Addresses of trial counsel and direct appeal counsel listed on Attachment A.

reasonably effective assistance of counsel before, during or after his capital murder trial and conviction.

8. It is widely recognized that a criminal defendant is entitled to effective legal representation. See Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963). Indeed, the adversarial system of justice depends on effective defense counsel. See United States v. Cronic, 466 U.S. 648 (1984). As detailed in the following Paragraphs 9 to 178 herein, Counsel for Mr. Maples were ineffective at all stages of the criminal proceedings against Mr. Maples. At the trial for his life, Mr. Maples's Counsel abdicated their constitutionally mandated responsibility to subject the State's case to meaningful adversarial testing. The errors of Counsel "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). Indeed, performance of Counsel fell far below "an objective standard of reasonableness" and failed "to make the adversarial testing process work." Strickland, 466 U.S. at 688, 690. None of the numerous errors of Counsel could be construed as part of a "sound trial strategy." Id. at 689. Mr. Maples now seeks relief from his unconstitutionally obtained conviction and sentence.

A. Counsel Were Ineffective, In Part, Because Of Inadequate Compensation.

9. In part, Counsel's ineffectiveness was the product of the insufficient funding available for counsel in a capital case. At the time of Mr. Maples's trial, Alabama law provided that court-appointed attorneys in capital cases could not be compensated more than $1,000 for out-of-court work for each phase of a capital trial, based on a $20 hourly rate. See Ala. Code § 15-12-

21 (1975). Accordingly, Counsel received no compensation whatsoever for out-of-court work in excess of fifty hours, other than overhead expenses, and were compensated at rates far below market level for the initial fifty hours. If Counsel had received adequate compensation, Counsel could have performed adequate investigation in preparation of both the guilt and penalty phases of Mr. Maples's trial, including searching for and interviewing relevant witnesses. If adequately compensated, Counsel also could have adequately prepared the few defense witnesses called to testify on Mr. Maples's behalf. Adequate compensation of Counsel could also have resulted in the avoidance of the multitude of issues raised in this Petition that, individually and cumulatively, result in ineffective assistance of counsel. This compensation is simply inadequate for the time required to adequately represent a capital defendant. But for Counsel's inadequate compensation, the outcome of Mr. Maples's trial would have been different.

10. This inadequate and statutorily-limited compensation violated the separation of powers doctrine, deprived Mr. Maples of effective assistance of counsel and violated his due process and equal protection rights. See Bailey v. State, 424 S.E. 2d 503 (S.C. 1992) (holding that capital litigation complexity required court-appointed attorneys to receive reasonable compensation from state and county funds); Makemson v. Martin County, 491 So. 2d 1109, 1112-13 (Fla. 1986) (holding that $3,500 limit on compensation in capital trial violated separation of powers and denied capital defendants effective assistance of counsel); DeLisio v. Alaska Superior Court, 740 P. 2d 437, 443 (Alaska 1987) (holding that the takings clause

precludes attorney payment at less than that "received by the average competent attorney operating on the open market"). "It is well established that the Sixth Amendment guarantees to criminal defendants not only the right of assistance of counsel, but requires that assistance be legally effective." Walthrop v. State, 506 So. 2d 273, 275 (Miss. 1987); Strickland v. Washington, 466 U.S. 668 (1984). The failure to provide adequate funding to Mr. Maples's court-appointed Counsel curtailed this most fundamental right.

B. Counsel Were Ineffective for Admitting Critical Elements of the Charged Offenses During Closing Argument.

11. The relevant Alabama statute enumerates one capital offense as "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct." Ala. Code § 13A-5-40 (10) (1994) ("Count One"). During closing arguments, Counsel admitted both elements of this offense – (1) the intentional murders of two people (2) pursuant to one scheme or course of conduct. But for Counsel's ineffective performance in these admissions, there is a reasonable probability that the outcome of Mr. Maples's trial would have been different. Counsel's admissions denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article 1, § 6 of the Alabama Constitution and under Alabama law.

i. Counsel's Admission of Intent.

12. Counsel's admissions during trial deprived Mr. Maples of his constitutional right to be tried before an impartial jury. During closing arguments, Counsel told the jury that Mr. Maples intentionally caused a loss of

life and that he should be guilty of at least one lesser included count of murder. "We are asserting that there is at least sufficient evidence as to one murder that he's guilty of and possibly two." (R. at 2913-14, 2939.) Later in the closing, Counsel admitted "two murders, ladies and gentlemen, his own actions for which he is responsible." (R. at 2918, 2929-30.)

ii. **Counsel's Admission of One Scheme or Course of Conduct.**

13. Counsel also admitted that Mr. Maples murdered pursuant to one scheme or course of conduct. "What we have here is the instance of him walking out to the car and in an instantaneous rush killing two people." (R. at 2918.) The State noted this admission during closing argument when they argued that "[Counsel] told you both deaths were caused instantaneously." (R. at 2959.)

iii. **These Admissions by Counsel Constitute Ineffective Assistance of Counsel.**

14. Despite Mr. Maples's desire, expressed in open court, to plead not guilty to all of the counts contained in the indictment, Counsel's admissions, as detailed in Paragraphs 12 to 13, were the "functional equivalent" of a plea of guilty to capital murder, a plea which resulted in a sentence of death. See Wiley v. Sowders, 647 F.2d 642, 649 (6th Cir. 1981) (citing United States v. Brown, 428 F.2d 1100, 1104 n.4 (D.C. Cir. 1970)); Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979); Achtien v. Dowd, 117 F.2d 989, 994 (7th Cir. 1941). It is fundamental that counsel may not override their client's decision to plead not guilty. See Brookhart v. Janis, 384 U.S. 1, 7-8 (1966). That decision is reserved solely to the client, and may not be usurped by his counsel. See Jones v. Barnes, 463 U.S. 745, 751 (1982);

Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C. J., concurring). Therefore, Counsel's conduct in overriding Mr. Maples's decision to plead not guilty "fall[s] outside the wide range of professionally competent assistance." Daniels v. State, 650 So. 2d 544, 552 (Ala. Crim. App. 1994) (quoting Strickland, 466 U.S. at 688).

15. The crime of intentional murder is automatically elevated to capital murder when two or more persons are murdered by a defendant pursuant to one scheme or course of conduct. See Holladay v. State, 549 So. 2d 122, 130 (Ala. Crim. App. 1988). Thus, Counsel's admission of Mr. Maples's guilt to a capital crime denied him the right to have his guilt presented to the jury as an adversarial issue. See Wiley, 647 F.2d at 650.

16. The jury, having been informed by Mr. Maples's own Counsel that he was guilty as charged, could not possibly have accorded Mr. Maples a presumption of innocence. Thus, Mr. Maples was tried by a jury that had a fixed opinion of his guilt prior to deliberations. Unsurprisingly, the jury deliberated less than four hours before unanimously determining that Mr. Maples was guilty of two counts of capital murder.

17. Counsel's admissions during closing arguments at the guilt phase of the trial deprived Mr. Maples of a fair trial and was based on a failure to know or understand the law that cannot be accorded deference as a reasonable trial strategy. See Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991); People v. Carter, 354 N.E.2d 482, 485 (Ill. App. Ct. 1976) (citing United States v. Bella, 353 F.2d 718, 719 (7th Cir. 1965)). There is a reasonable probability that, but for

Counsel's deficient performance, the result of the proceeding would have been different.

C. Counsel's Chosen Strategy Not to Investigate, Pursue and Present a Defense Based on Intoxication was Unreasonable.

i. Counsel Failed to Investigate, Pursue and Present a Defense Based on Intoxication.

18. As detailed below, substantial evidence existed that Mr. Maples was intoxicated on alcohol and drugs on the night of the offense, showing that Mr. Maples lacked the capacity to form the specific intent necessary under Alabama's capital murder statutes. Some, but not all, of this available evidence of intoxication was presented *by the State* during the guilt phase of the trial. Counsel's performance was unreasonable and woefully inadequate in that, as further explained below, (a) they failed to introduce all available evidence of intoxication, (b) they systematically objected when the State attempted to introduce evidence that showed or tended to show that Mr. Maples was intoxicated, thereby causing some of the evidence favorable to the defense not to be included and (c) they called "defense" witnesses whose testimony tended to contradict the more reliable available evidence that Mr. Maples was intoxicated and cross-examined prosecution witnesses to rebut evidence of Mr. Maples's use of alcohol and drugs. Counsel's conduct in failing to pursue and present a defense based on intoxication "fall[s] outside the wide range of professionally competent assistance." Daniels, 650 So. 2d 5 at, 552 (quoting Strickland, 466 U.S. at 688).

19. The State introduced extensive evidence proving that Mr. Maples was intoxicated by the time he

went to a pool hall shortly before the shootings (drinking a "few beers" at an evening cookout (R. at 2738-39); drinking more alcohol at a party, (R. at 2740); and going to a bar and continually drinking more alcohol between 8:30 p.m. or 9:00 p.m. and 10:30 p.m. or 11:00 p.m. (R. at 1795-1821)). At the pool hall, Mr. Maples appeared drunk to some of those present. A witness at the pool hall testified that Mr. Maples was acting "[j]ust loud in general, you know, like a drunk person would act when they get too much in them or something." (R. at 1858-60.) Jason Boyd, who was at the pool hall and played pool with Mr. Maples, testified that Mr. Maples "wasn't shooting [pool] as well [as normal] and seemed like he was a little hyper, but that was about it" and that it was possible that he was affected by "something." (R. at 1848.)

20. The State also introduced evidence that Mr. Maples used crack and crystal methamphetamine on the night of the shootings: evidence of drug paraphernalia (R. at 2516-17), testimony from April Phillips, an acquaintance of Mr. Maples's whom Mr. Maples visited shortly after the shootings, that Mr. Maples had drugs in his hand and told her that he had been doing "crystal meth and crack" that evening (R. at 1894, 1910-11, 1915), and testimony that Mr. Maples bought crack cocaine on the night of the shootings (R. at 1458, 1983, 1986).

21. In stark contrast, Counsel attempted to establish through cross-examination of State witnesses and the testimony of several defense witnesses that Mr. Maples was not intoxicated at the time of the shootings. Amazingly, while summarizing the cross-examination and direct examination testimony during his closing argument, Counsel inaccurately told the

jury that "[t]here is no evidence that he consumed drugs that night." (R. at 2920.)

22. Given this abundant evidence that Mr. Maples was intoxicated at the time of the offense, no reasonable counsel would have failed to present and pursue a defense of intoxication. Such failure, which could only amount to Counsel's failure to conduct a substantial investigation into any of Mr. Maples's plausible lines of defense, constituted ineffective assistance of counsel. See House v. Balkcom, 725 F.2d 608, 617-18 (11th Cir.), cert. denied, 469 U.S. 870 (1984). Indeed, a defense based on intoxication would have rebutted the specific intent element required by law for each capital offense Mr. Maples was charged. In the absence of specific intent, Mr. Maples could only be charged with a lesser included offense (Ala. Code § 13A-1-9(a) (1994)), in this case manslaughter (Ala. Code § 13A-6-3 (1994)). In addition, a finding of intoxication at the guilt phase of the trial would have been consistent with the mitigating factors presented by the defense during the sentencing phase of the trial. (See Paragraphs 175 to 176.)

22A. Similarly, Counsel failed to investigate evidence of intoxication. Accordingly, although Counsel briefly interviewed James Smith (a.k.a. "Fishbone"), one of the prosecution's witnesses regarding Mr. Maples post-crime behavior, Counsel never inquired about whether Mr. Maples appeared to be intoxicated. Nor did Counsel ask the three other individuals who were present at Mr. Smith's house about Mr. Maples's appearance, although Counsel were already aware of the conclusive evidence of Mr. Maples's intoxicated state shortly before the shootings (see Paragraphs 18 to 20), as well as after the

shootings, based, among other things, on his interview of Ms. Phillips conducted at about the same time as Mr. Smith's interview. Therefore, Counsel unreasonably failed to properly investigate all the evidence available to him that Mr. Maples's intoxicated state.

22B. Had Counsel done so, Counsel would have learned that Mr. Maples appeared to be intoxicated and in fact told Mr. Smith that he had taken drugs prior to his arrival at Mr. Smith's house. Such evidence could have been used to support an intoxication defense; it also would have undermined the State's robbery theory by demonstrating that Mr. Maples apparently did not need to sell the cue stick found in Mr. Terry's vehicle in order to obtain drugs, thus establishing a reasonable doubt regarding Mr. Maples intentions to rob in order to feed a drug habit. (See Paragraphs 30 to 31.)

23. In light of the foregoing, Counsel's performance fell so far below the standard of reasonable performance that it cannot be considered either a strategic decision or effective assistance of Counsel. Given the evidence against Mr. Maples and the prosecution's strategy at trial, no competent counsel would have made the strategic choices Counsel made or conducted the defense as Counsel did. Counsel's choice of strategy, use of inconsistent strategies, and efforts (or lack thereof) to implement these strategies were unreasonable and constitute ineffective assistance of counsel. See Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000). Thus, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

ii. **Counsel Failed to Request a Jury Instruction on Intoxication and Manslaughter.**

24. Despite of all the evidence presented at trial, albeit mostly presented by the State, showing that Mr. Maples was intoxicated at the time of the offense, Counsel also failed to request jury instructions relating to intoxication and the lesser included offense of manslaughter.

25. It is established that an accused is entitled to have the jury consider the issue of his intoxication where the evidence of intoxication is conflicting, see Owen v. State, 611 So. 2d 1126, 1128 (Ala. Crim. App. 1992); where the evidence is offered by the State, see Coon v. State, 494 So. 2d 184, 187 (Ala. Crim. App. 1986); and where the defendant denies the commission of the crime, see Owen, 611 So. 2d at 1127-28.

26. Moreover, a defendant is entitled to have charges given as long as they are supported "by any evidence, however weak, insufficient, or doubtful in credibility." Chevers v. State, 361 So. 2d 1106, 1107 (Ala. 1978) (citations omitted); see also Duncan v. State, 6 So. 2d 450, 453 (Ala. Ct. App. 1942); Fletcher v. State, 621 So. 2d 1010, 1019 (Ala. Crim. App. 1993) ("It is clear that '[a] defendant is entitled to a charge on an [intoxication] if there is any reasonable theory from the evidence that would support the position.' This is true regardless of 'however weak, insufficient, or doubtful in credibility' the evidence concerning that offense.") (citing Ex parte Oliver, 518 So. 2d 705, 706 (Ala. 1987) and Chevers, 361 So. 2d at 1107). It is solely in the absence of **any** evidence of intoxication whatsoever that the court could potentially refuse to give an instruction on intoxication when requested by Counsel.

Thus, even if Counsel had not pursued a defense strategy based on intoxication, it was incumbent upon Counsel to request the court give such instructions because evidence of intoxication was extensively presented and discussed at trial.

27. Counsel's failure to request such instructions severely prejudiced Mr. Maples at trial as well as on appeal, because (a) the jury was deprived of the opportunity to consider the issue of Mr. Maples's intoxication and (b) absent Counsel's specific request, the court's failure to give such instructions was reviewed by the appellate court under the stringent "plain error" standard. See Maples, 758 So. 2d at 28 *et seq.* This prejudice was compounded by Counsel's failure to further investigate available evidence of intoxication, and to pursue and present a defense based on intoxication. (See Paragraphs 18 to 23.) The combination of these two errors was not considered on direct appeal.

28. In light of the foregoing, Counsel's performance fell so far below the standard of reasonable performance and demonstrated such failure to know or understand the law that it cannot be considered either a strategic decision or effective assistance of Counsel. Here, "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

D. **Counsel Failed to Adequately Challenge the State's Investigation and Presentation of the Case.**

29. Counsel failed to properly challenge the State's investigation and presentation of its case, failed to object to irrelevant and prejudicial evidence introduced

by the State, failed to adequately cross-examine State witnesses and failed to recognize or adequately object to court error, thereby abdicating their constitutionally mandated responsibility to subject the State's case to adversarial testing. See Strickland v. Washington, 466 U.S. 668 (1984). The errors of Counsel allowed the State to present its weak case essentially unchallenged and untested, and permitted the State to present considerable evidence that should have been suppressed or otherwise properly excluded.

i. **Counsel Failed to Adequately Challenge the State's Presentation of the Robbery Elements.**

30. Counsel failed to challenge the State's proof regarding Mr. Maples's intent to rob at the time of the incident. An accused "is not guilty of capital robbery-murder where the intent to rob was formed only after the victim was killed." Connolly v. State, 500 So. 2d 57, 62 (Ala. Crim. App. 1985). Despite the lack of evidence suggesting that the murder of Stacy Terry was in furtherance of the robbery -- and not the other way around, as Mr. Maples explained in his videotaped statement made shortly after his arrest -- Counsel made no argument on this crucial issue. (R. at 2730-32.)

31. Counsel were ineffective for failing to introduce available evidence that Mr. Maples had access to Mr. Terry's vehicle prior to the incident and could have taken it without force. Particularly, although Le Ann Clemons testified at trial that, during the evening preceding the murders, Mr. Maples had had free access to the keys of Mr. Terry's vehicle (R. at 1809), Counsel failed to draw the obvious inference that Mr. Maples did not need to commit the murders in order to rob Mr. Terry's vehicle, and thus to create a

reasonable doubt as to Mr. Maples's intentions at the time of the shootings. With that evidence, Counsel should have persuasively argued against the prosecution's theory that Mr. Maples committed these crimes in order to take the car from Mr. Terry by force. Since the State's evidence pertaining to Mr. Maples's intent at the time of the incident was far from overwhelming, Counsel were ineffective for failing to introduce evidence that would have established reasonable doubt and negated the prosecution's theory regarding Mr. Maples's intentions.

ii. **Counsel Failed to Object to or Adequately Argue Against the Admission of Irrelevant and Prejudicial Post-Murder Events.**

32. It is axiomatic that only relevant, probative evidence is properly admissible at trial. See Ala. R. Evid. 402; Old Chief v. United States, 519 U.S. 172 (1997). Therefore, Counsel's failure to challenge the introduction of prejudicial and irrelevant testimony received during the guilt phase of Mr. Maples's trial constituted ineffective assistance of counsel.

33. Mr. Smith, a State witness, testified that he saw Mr. Maples shortly after the shootings, driving Mr. Terry's vehicle in his neighborhood of Northwest Decatur. According to Mr. Smith, Mr. Maples wanted to sell some items, including a pool cue stick. (R. at 1983-85, 1987, 1991-92.) Another State witness, a pawnshop employee named Trevor Nickens, testified that he bought the pool cue stick from Mr. Smith. (R. at 2018-25.) The testimony of these witnesses was irrelevant and highly prejudicial, especially since the indictment did not charge Mr. Maples with the robbery of the pool cue stick; it only charged Mr. Maples with the robbery of the vehicle. Counsel should have filed a

motion *in limine* to prevent the introduction of this evidence of uncharged crime and should have objected to its admission at trial. Since there was no legitimate reason for the State to introduce this highly prejudicial evidence, it was ineffective for Counsel to fail to object to its introduction at trial.

34. Various witnesses testified that Mr. Maples was showing off Mr. Terry's vehicle on July 8, 1995, the day after the shootings as if it were his new car. (R. at 1954, 2032, 2050, 2095.) The testimony of these witnesses served no legitimate purpose for the State's case and was highly prejudicial to Mr. Maples's case. The State used this evidence to inappropriately influence the jury in its determination of whether Mr. Maples had formulated the intent to rob at the time of the shootings. (R. at 2889-90.) However, since the boasting behavior occurred well after the violent event in question, its probative value regarding Mr. Maples's state of mind at the time of the event was substantially outweighed by its prejudicial impact. In light of the central importance of this issue of intent to Mr. Maples's case, this evidence should have been excluded from the jury's consideration. Yet Counsel neither objected to the introduction of this testimony nor requested a limiting instruction.

35. Ms. Jennifer Clem, a State witness, testified that on July 8, 1995, Mr. Maples stopped at the gas station where she worked and cashed a $300 check that was made out to Mr. Terry. (R. at 1952-53.) Linda Carter, the owner of the gas station, testified that she found the cashed check in her money bag on July 9, 1995. (R. at 1963-78.) Again, this testimony should not have been allowed into evidence on relevance grounds. Since Mr. Maples was not charged with taking the

check from Mr. Terry—as mentioned previously, the indictment only charged Mr. Maples with the robbery of the vehicle—this evidence served no legitimate purpose for the State other than to prejudice the jury against Mr. Maples. Counsel should have filed a motion *in limine* to prevent the introduction of this evidence of uncharged crime and should have objected to its admission at trial.

iii. **Counsel Failed to Adequately Cross-Examine Witnesses.**

36. Counsel either failed to cross-examine or ineffectively cross-examined most of the 60 witnesses called by the State to establish Mr. Maples's guilt. Such a failure by Counsel to adequately challenge or rebut the major part of the State's evidence through cross-examination amounted to not presenting any defense at all. By failing to effectively cross-examine State witnesses, Counsel abdicated their constitutionally mandated responsibility to subject the State's case to adversarial testing. See Strickland v. Washington, 466 U.S. 668 (1984).

37. Among other things, Counsel failed to elicit testimony from Ms. Phillips about her relationships with and drug connections to Mr. Robinson, Frank Meiner (the roommate of Mr. Robinson who disappeared immediately after the shootings) or John Lansdell (another roommate of Mr. Robinson and alleged drug dealer) and whether they had any disputes with Mr. Maples over drugs. Counsel also failed to elicit testimony from Ms. Phillips about Mr. Maples's intoxicated appearance shortly after the shootings. Counsel were already aware of the conclusive evidence of Mr. Maples's intoxicated state shortly before the shootings. (See Paragraphs 18 to

20.) The additional evidence, concerning Mr. Maples's intoxicated state shortly after the shootings, would have given rise to a very strong inference that Mr. Maples was also intoxicated at the time of the shootings. But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

38. Counsel made no attempt to impeach Stephen Tant (the motel manager with whom Mr. Maples resided in Nashville from approximately July 9, 1995 until his arrest on August 1, 1995) concerning his testimony that his consent to search his room was obtained voluntarily. Counsel failed to elicit testimony that Mr. Tant's coerced consent was actually the result of his being surrounded by many Nashville police with guns drawn and pointed directly at him and illegal drugs being in plain view of the police officers in the room. (See, in part, Paragraphs 68 to 69.) But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

39. Counsel also failed to elicit testimony from James Dobbs (a friend of Mr. Maples), one of the last people to see Mr. Robinson, Mr. Terry, and Mr. Maples together, concerning the substance of Mr. Maples's conversation with him less than an hour before the shootings and Mr. Maples's physical state and intoxicated appearance at that time, despite substantial evidence conclusively establishing Mr. Maples's intoxication prior to the shootings. (See Paragraphs 18 to 20.) Counsel also failed to elicit testimony concerning Mr. Dobbs's and Mr. Maples's drug dealing disputes, Mr. Dobbs's knowledge that certain people sought to harm Mr. Maples, Mr. Maples's relationship and connections to violent drug dealers and his

knowledge of threats received by Mr. Maples's family from drug associates prior to Mr. Maples's arrest. Finally, Counsel failed to elicit from Mr. Dobbs that Mr. Maples had had on several occasions access to one or more cars owned by Mr. Dobbs and that Mr. Maples never attempted to steal any of these vehicles, although he would have had the opportunity. Counsel failed to do so although Mr. Dobbs testified to the prosecution that he would let Mr. Maples borrow his cars. (R. at 2087.) But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

40. Counsel failed to impeach Heather Davis, a former girlfriend of Mr. Maples, concerning statements she made at trial that were harmful to Mr. Maples and indicated that she did not think very highly of him with evidence of letters she subsequently wrote to Mr. Maples in jail wherein she discussed naming her unborn child after Mr. Maples. Clearly, Ms. Davis's regard for Mr. Maples subsequent to the shootings was still quite high, in spite of her earlier statements to the police. But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

41. In spite of the Counsel's knowledge of Mr. Lansdell's prior acquaintance with Mr. Maples and Mr. Terry based on his interview with Mr. Lansdell and other persons, Counsel failed to elicit testimony concerning any drug-related conflicts between Mr. Maples and Mr. Lansdell and simply failed to cross-examine Mr. Lansdell after the latter surprisingly testified that he did not know Mr. Maples. (R. at 1864.) But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

42. [Paragraph intentionally omitted.]

43. Counsel also failed to elicit from the Decatur police testimony that there were many more shell casings at the crime scene that were not collected or analyzed by the police. Such a failure to elicit information about the incomplete investigation by the Decatur police prejudiced Mr. Maples and, but for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

44. The abovementioned cumulative errors of Counsel, though not exhaustive, allowed the State to present its case essentially uncontested and win a conviction and death sentence on the basis of virtually unchallenged evidence. As the Alabama Supreme Court noted, "[t]he only person the jury could have expected to rebut the State's evidence ... [is] the defendant," and when counsel does not effectively rebut the State's evidence, counsel provides ineffective assistance. Ex parte Williams, 461 So. 2d 852, 854 (Ala. 1984). But for Counsel's failure to challenge the State's theory through effective cross-examination, the outcome of the guilt phase of Mr. Maples's trial would have been different. See Strickland, 466 U.S. at 694.

iv. **Counsel Failed to Recognize and Adequately Object to Trial Errors.**

45. As detailed in Paragraphs 46 to 57 Counsel's repeated failure to recognize and adequately object to trial error prejudiced Mr. Maples at trial, as well as on appeal where the appellate court repeatedly noted that, "[w]hile [counsel's] failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice." Maples v. State, 758 So. 2d 1, 16 (citing Ex parte Kennedy, 462 So. 2d 1106, 1111 (Ala. 1985)). Thus, Counsel's failure to object to what

might otherwise have been reversible errors caused the appellate court to review them under the far more stringent "plain error" standard. See Maples v. State, 758 So. 2d at 7; Ala. R. App. P. 45A.

a. Juror Issues

46. Counsel failed to object to the court excusing for cause several potential jurors who expressed reservations concerning the death penalty. (R. at 461, 540, 541, 672, 756, 902, 919.) Venire members Marvin Bundy, Wade Hensley, and Jimmy Rodgers were excused in part because of their views on the death penalty. For instance, when asked by the State whether they could return a death verdict, Mr. Hensley (R. at 540) and Mr. Rodgers (R. at 541) responded "I don't know." When asked about his opinion about the death penalty, Mr. Bundy responded "I'm opposed to capital punishment." (R. at 461.) The exclusions of these jurors, who possessed a commonality in their reservations concerning the death penalty, violated Mr. Maples's right to a constitutional trial and violated the equal protection rights of those excluded jurors. See J.E.B. v. Alabama, 511 U.S. 127, 140 (1994) ("[W]e have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures.") (citations and quotations omitted); Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that venire members cannot be properly excluded merely because they express some reservations about the death penalty). Had Counsel objected to the unconstitutional exclusion of these potential jurors there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

47. Counsel failed to object to the improper briefing of the jury outside of Counsel's presence. At the outset of Mr. Maples's trial, the court admitted that while the venire members were in another courtroom, they heard about the case *from another judge*. (R. at 452.) The court stated that "[t]his case, [as the other judge] may have told you, may go possibly as long as three weeks." (R. at 452.) Mr. Maples was not present during the venire's appearance before this other judge, and it is unclear what else this other judge may have told the venire concerning Mr. Maples's trial. By informing the venire about the case in the absence of Mr. Maples and his Counsel, this judge violated Mr. Maples's fundamental right to be present at all stages of a capital proceeding. See e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Diaz, 223 U.S. 442, 454 (1912) (holding that a defendant is "entitle[d] to be present at all ... stages of the proceedings"); see also Ex parte Jackson, 674 So. 2d 1365 (Ala. 1994) (holding that a capital defendant may not waive his right to be present in a capital proceeding). Had Counsel objected to the venire members being informed about Mr. Maples's case outside of Mr. Maples's presence there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

48. Counsel failed to object to the court's failure to remove venire member Jason Wilbanks for cause because Mr. Wilbanks indicated that he would automatically vote for a sentence of death if Mr. Maples were found guilty of the capital offense charged against him. Indeed, when Counsel asked the panel whether an individual found to have "intentionally [taken] a human life...should lose his life automatically," Mr.

Wilbanks responded "[y]es." (R. at 1088-89.) When Counsel asked Mr. Wilbanks specifically whether he would "automatically vote for the death penalty once that's proven," Mr. Wilbanks again answered "[y]es." (R. at 1093-94.) Such beliefs are not permissible among jurors hearing a capital case. See Morgan v. Illinois, 504 U.S. 719 (1992); Bracewell v. State, 506 So. 2d 354 (Ala. Crim. App. 1986). Because of the court's failure to remove venire member Wilbanks upon Counsel's challenge for cause, Mr. Maples was compelled to use a peremptory challenge to remove Mr. Wilbanks. (R. at 1387.) This unconstitutionally reduced the number of preemptory challenges available to Mr. Maples to remove other members from the venire. See Pointer v. United States, 151 U.S. 396, 414 (1894) (holding that the right to exercise peremptory challenges is "one of the most important rights secured to the accused"); Uptain v. State, 534 So. 2d 686 (Ala. Crim. App. 1988) (granting a new trial in part because defendants were required to use peremptory challenges in order to eliminate venire persons who had been properly challenged for cause, which effectively reduced their total number of peremptory challenges); England v. State, 601 So. 2d 1108 (Ala. Crim. App. 1992). Counsel's failure to object to the court's failure to remove venire member Wilbanks raised the reasonable probability that, had Counsel objected, the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

49. Counsel failed to object to the court erroneously bestowing heightened authority upon the jury foreperson in its jury instruction. The court instructed the jury to elect a foreperson before undergoing its deliberations. (R. at 3019.) The court

further instructed the jury that this foreperson was to moderate the deliberations and act as the spokesperson for any communications with the court. (R. at 3019.) Such a delegation of authority to a jury foreperson lacks any basis in the law and denied Mr. Maples a fair and representative jury. See generally Ala. R. Crim. P. 12; Pace v. State, 714 So. 2d 332 (Ala. 1997) ("[T]he role of a ... foreperson in Alabama is so ministerial that even his or her failure to participate in deliberations and to vote with the panel is not fatal to the indictment."). Had Counsel objected to this erroneous instruction and impermissible bestowal of authority there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

50. Counsel failed to object to the jury improperly conducting a portion of its deliberations in open court. Once the jury began deliberating, they decided that they needed to review Mr. Maples's videotaped and audiotaped statements. (R. at 3044-45.) The court required the jury be brought from the deliberation room and review these statements in open court. (R. at 3045.) This review took place in front of counsel for both sides, the victims' family members and members of the public. This highly unusual procedure violated Alabama law and Mr. Maples's constitutional rights. It is axiomatic that a jury be free to deliberate and decide upon a verdict and sentence isolated from outside influence and bias. See Lowery v. State, 122 So. 603 (Ala. 1929); Voyles v. State, 596 So. 2d 31 (Ala. Crim. App. 1991); Alabama Gas Corp. v. American Furniture Galleries, 439 So. 2d 33 (Ala. 1983). Furthermore, under Alabama law, the jury has an unqualified right to view evidence in the privacy of the deliberation room

upon retirement. See Ala. Code § 12-16-14 (1994) ("All instruments of evidence and depositions read to the jury may be taken out by them on their retirement.") When a court refuses to permit a jury to take evidence introduced at trial into the deliberation room, it interferes with the jury's deliberative process, and the ensuing verdict is unreliable and constitutionally infirm. See Puckett v. State, 18 So. 2d 834 (Ala. Crim. App. 1944). Had Counsel objected to this improper and unprecedented procedure there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

51. Counsel failed to object to the numerous errors in the instructions given to the jury. For example, in its initial instruction to the jury on reasonable doubt, the court stated that "to return a verdict of guilty, [the jury] must not be able to say that [they] believe the defendant is not guilty, and give a good reason why [they] believe that." (R. at 1443.) Requiring that a "good" reason support a reasonable doubt was an improper standard and confusing to the jury's and understanding of the law. Indeed, instructing the jury to justify a reasonable doubt with a "good" reason was not only confusing, it also was improper, as the standard "good," which can have a moral connotation, is greater than the "reasonable" standard, which merely refers to logic. It also shifted the burden of proof, requiring that Mr. Maples provide a "good" reason why the State's case was subject to a reasonable doubt. Holding the State to a standard of proof beyond a reasonable doubt is the keystone to the United States criminal justice system. See e.g., Sandstrom v. Montana, 442 U.S. 510 (1979) (holding that instructions that reduce the burden of proof by shifting it to the

defendant deprive a defendant of due process and a fair trial); In re Winship, 397 U.S. 358, 364 (1970) (finding that proof beyond a reasonable doubt is the "prime instrument for reducing the risk of convictions resting on factual error."); see also Beard v. State, 612 So. 2d 1335 (Ala. Crim. App. 1992). Had Counsel objected to this erroneous instruction there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

52. The court also improperly instructed the jury concerning the finding of aggravating circumstances. The court instructed the jury that they "should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence of an aggravating or mitigating circumstance." (R. at 3322.) These instructions violated the United States Constitution and Alabama law. A jury, during the sentencing phase of capital proceedings, may consider only those aggravating circumstances contained in Section 13A-5-49 of the Alabama Code. See Ala. Code §13A-5-49 (1994); Beck v. State, 396 So. 2d 645 (Ala. 1980). Here, the court instructed the jury to consider "any" evidence of aggravating circumstances, despite the applicability of only a single statutory aggravating circumstance. This is constitutionally impermissible. See Woodson v. North Carolina, 428 U.S. 280 (1976).

53. As detailed in Paragraphs 51 to 52 above, had Counsel objected to the court's confusing and incorrect instruction on reasonable doubt and the court's instruction to consider "any" evidence of aggravating circumstance the reasonable probability exists that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

b. Evidentiary Issues.

54. Counsel failed to object to evidence that was introduced without the proper chain of custody established. Numerous swatches of cloth were removed from Mr. Terry's vehicle, as well as other evidentiary items introduced at trial. These cloth swatches were later tested by forensic laboratories and produced incriminating evidence against Mr. Maples. Sheriff Steve Crabbe, who testified that he retrieved Mr. Terry's vehicle from Nashville, stated that he turned the vehicle over to Morris Glen Brown, a scientist at the Huntsville division of the Alabama Department of Forensic Sciences. (R. at 2329.) However, the circumstances in which Mr. Brown received the custody of the vehicle and the items therein were not clearly explained at trial. Indeed, Mr. Crabbe indicated only that he picked up the vehicle "from a forensic sciences impound lot ... at the Nashville Metropolitan Police Department." (R. at 2328.) Mr. Brown did not testify that he retrieved the vehicle in the presence of Mr. Crabbe. There was an uncertainty as to the chain of custody. Therefore, there is a likelihood that there may have been a critical "missing link" in the chain of custody for the vehicle, rendering the evidence collected therefrom inadmissible at trial. See Ex parte Cook, 624 So. 2d 511 (Ala. 1993); Ex parte Holton, 590 So. 2d 918 (Ala. 1991); Russaw v. State, 624 So. 2d 234 (Ala. Crim. App. 1993); Laws v. State, 562 So. 2d 305 (Ala. Crim. App. 1990). Counsel's failure to object to the introduction of this inadmissible evidence created the reasonable probability that had they objected the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

55. Counsel failed to object to the court referring to evidence which would not be presented to the jury. The court informed the jury that some of the evidence, if ruled inadmissible, would not be seen by the jury: "There are documents and tapes that may be offered. I don't know yet. I haven't ruled on the admissibility of all that yet, but there are a number of documents that *may* be offered into evidence that you will be able to consider." (R. at 1444.) In order to protect a criminal defendant's rights, it is established that the prosecutor may not comment on evidence which is not educed before the jury. See Allen v. State, 659 So. 2d 135, 137 (Ala. Crim. App. 1994) (condemning prosecutorial statements "'which suggest and might lead the jury to believe, that there was other evidence, not presented to them, which would prove the defendant's guilt") (quoting Kim v. State, 518 So. 2d 191, 193-94 (Ala. Crim. App. 1987) (citing Ex parte Washington, 507 So. 2d 1360 (Ala. 1986)); Story v. State, 665 So. 2d 963 (Ala. Crim. App. 1995) ("[C]omments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury.") (citations omitted). If it is improper for the prosecutor to comment or allude to evidence not presented to the jury, the court certainly cannot make similar references. Counsel's failure to object to the court's improper reference to evidence the jury may not see created the reasonable probability that had Counsel objected the outcome would have been different. See Strickland, 466 U.S. at 694.

56. Counsel failed to object to the introduction of evidence of wholly unrelated offenses allegedly

committed by Mr. Maples. For example, the State was permitted to introduce a fingerprint card of Mr. Maples from a prior DUI arrest. (R. 2378-81.) In addition, Counsel filed an untimely motion for mistrial after the testimony of police officer Harding from the Decatur Police Department, who testified that he had booked Mr. Maples at a "prior date." (R. at 2379.) The State also introduced photographs of Mr. Maples's bedroom. Plainly visible in the photographs were stolen highway road signs displayed on the walls of Mr. Maples's room. Stealing road signs is a felonious offense. See Ala. Code 13A-8-71(c) (1994). Such evidence is inadmissible and impermissible in a criminal prosecution, where the general rule is that "evidence of other separate and distinct criminal acts is not admissible since the only facts to be laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone the defendant is called upon to answer." Hinton v. State, 189 So. 2d 849, 851 (Ala. 1966) (citing Garner v. State, 269 Ala. 531, 533 (1959); Brasher v. State, 249 Ala. 96, 98 (1947)); Old Chief v. United Sates, 519 U.S. 172 (1997). The introduction of such evidence was especially prejudicial in this instance because one of Mr. Maples's mitigating factors was his lack of prior criminal history. Had Counsel objected to the introduction of this inadmissible and prejudicial evidence, there was a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

c. Court Orders

57. Counsel failed to object to the court's contradictory and confusing orders regarding Mr. Maples's need to give physical exemplars. The State

moved the court to authorize the collection of physical exemplars from Mr. Maples on February 5 and 6, 1997. (Ct. R. at 340, 341.) Mr. Maples immediately objected to the State's motion, and properly asserted that the case was in the final stages of preparation and that granting the State's motion would materially affect the evidentiary record in the case. (Ct. R. at 342.) The court initially agreed with Mr. Maples, and denied the State's request on February 14, 1997. (Ct. R. at 377.) Subsequently, however, after the State was granted a continuation, the court reversed itself and granted the State discovery of physical exemplars. (Ct. R. at 391.) Although in some circumstances, the State may have the authority to collect physical exemplars from criminal suspects, Mr. Maples had an equivalent and countervailing right to rely on the finality of the court's rulings. See Brown v. Ohio, 432 U.S. 161 (1977); Pettway v. State, 648 So. 2d 647, 650 (Ala. Crim. App. 1994) (noting the important "element of needed finality" in a criminal case). The court's contradictory rulings in this case severely hampered Mr. Maples's ability to rebut the states evidence. Counsel's failure to object to the court's contradictory and confusing order supports the reasonable probability that had they properly objected, the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

E. Counsel Failed to Request and Use Necessary Expert Assistance.

58. A criminal defendant's right to the benefit of expert assistance is constitutionally recognized and protected. See Ake v. Oklahoma, 470 U.S. 68 (1985); Griffin v. Illinois, 351 U.S. 12 (1956); Gayle v. State, 591 So. 2d 153 (Ala. Crim. App. 1991). In this case, Counsel

failed to protect Mr. Maples's right when they failed to request a mental health expert, a pharmacologist or other expert in drug interactions and other experts who would have assisted counsel in preparing to defend Mr. Maples.

i. **Failure to Request and Use the Assistance of a Mental Health Expert.**

59. There was evidence available to Counsel and to Dr. Allen Shealy, the psychologist who testified in the second stage of the trial, that would have shown that Mr. Maples had abused drugs and alcohol and that he had ingested a substantial quantity of alcohol, some marijuana and perhaps other drugs on the day of the killings. (See Paragraphs 18 to 20.) Evidence was also available to show that Mr. Maples had experienced an extremely abusive early childhood, suffering from both physical abuse and abandonment by his birth mother, (see Paragraphs 115 to 129), that Mr. Maples had several experiences with violent death, (see Paragraph 123) and that Mr. Maples suffered head injuries in the past (see Paragraph 150).

60. A mental health expert would have testified during the guilt phase of Mr. Maples's trial to the effects of these experiences upon Mr. Maples's narrative style and his flat affect. These qualities were apparent on the videotape of his statement to the police and in his courtroom demeanor. Upon information learned from interviews with the jurors, these qualities might have made a negative impression on the jurors. But for Counsel's failure to elicit such testimony, the outcome of the trial would have been different.

61. Yet Counsel, who had retained a psychologist to evaluate Mr. Maples and to testify in the second stage of the trial, never asked that the psychologist

view the videotaped statement. Nor did Counsel ask the psychologist to testify in the guilt phase of the trial, although his testimony would have provided crucial information to the jury about Mr. Maples's flat affect and demeanor and his need to mask his emotions. Such information would have permitted the jury to better understand Mr. Maples and his situation. But Counsel did not take these steps. Instead, Counsel allowed the entire guilt phase of the trial to be completed and the jury to be excused to deliberate without doing anything to lessen the impact of Mr. Maples's videotaped statement, or the impact of his courtroom demeanor. Had Counsel obtained an expert to testify on these issues during the guilt phase of Mr. Maples's trial, there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

62. The importance to jurors of understanding the demeanor and behavior of the defendant in a murder case is well-documented. See, e.g., S. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, Cornell L. Rev. 1561 (1998) ("Above all else, however, the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendants' remorse.") In view of the fact that Mr. Maples did not testify, the failure to engage the psychologist or other mental health expert to explain Mr. Maples's flat affect and demeanor and their related causes was ineffective assistance of counsel and cannot be considered a strategic decision.

ii. **Counsel Failed to Request the Assistance of a Pharmacologist or Other Expert in Drug Interactions.**

63. Prior to trial, there was evidence available to Counsel, including documentary and testimonial evidence from Quest Recovery Center counselors, Philip Maples, Ms. Maples and numerous other friends and relatives of Mr. Maples as well as other witnesses, that, prior to the shootings, Mr. Maples had a severe drug problem, including the abuse of alcohol, marijuana, crack, cocaine and LSD, of such severity that he had sought help for it. There was also considerable evidence available that Mr. Maples had been relatively drug-free for several months prior to the shootings and that Mr. Maples ingested a considerable quantity of alcohol and marijuana during the day of the shootings. With such evidence available, and with a lack of evidence suggesting that the murder of Stacy Terry was in furtherance of a robbery, Counsel was ineffective for failing to obtain an expert to testify as to Mr. Maples's cognitive ability to form an intent to rob, and whether and to what extent that ability was impacted by his drug ingestion, especially Mr. Maples's impairment after ingesting drugs and alcohol following a relatively drug-free period.

64. Under these circumstances, Counsel was ineffective for failing to request the services of an expert who could consult the available evidence, determine how much of which drugs Mr. Maples ingested or used prior to the shootings, and offer testimony about the effects those drugs would have had on his mental state at the time of the shootings. Depriving Mr. Maples of his constitutionally guaranteed assistance of experts cannot be considered a strategic decision under Ake and its progeny. But for Counsel's failure to request a pharmacologist or other expert in drug interactions and elicit testimony from

that expert, the outcome of Mr. Maples's trial would have been different.

iii. Counsel Failed to Request the Services of Other Experts.

65. In addition, Counsel never requested an expert in ballistics to help show the jury the weaknesses and meagerness of the State's evidence, as well as to conduct certain tests on the bullets not performed by the State which might establish the metallic and chemical composition of the bullets recovered from the bodies to see if they matched that of bullets taken in the search of the Maples's trailer. Such tests could have shed light on the circumstances of the shootings. But for Counsel's failure to request an expert in ballistics, the outcome of the trial would have been different.

66. Similarly, Counsel never requested funds for a blood spatter expert who could have countered the State's testimony and argument seeking to emphasize and inflame the jury with the "bloodiness" of the crime. The State introduced into evidence sixty-three photographs of the interior of Mr. Terry's Camaro. There were also forty-four references in Howard Battles' testimony alone to bloodstains in the car, including references such as "this crusty blood all in the bottom of this door pocket." (R. 2196.) In addition, the State introduced cuttings of the car upholstery allegedly containing the bloodstains. Despite the imperative need to adequately address the duplicative and inflammatory evidence presented by the State, Counsel never made any attempt to request or procure a blood spatter expert who could have analyzed the evidence and testified as to the relative lack of blood in the vehicle. But for Counsel's failure to request a blood

spatter expert, the outcome of the trial would have been different.

67. As detailed in Paragraphs 58 to 66 above, Counsel's repeated failures to procure expert assistance at trial to which Mr. Maples was constitutionally entitled could not be considered reasonable trial strategy. Instead, such failures were derelictions of Counsel's duty to zealously represent Mr. Maples and constitute ineffective assistance of counsel.

F. Counsel Failed to Present, Adequately Argue and Obtain Favorable Rulings on Motions.

i. Suppression Motions.

68. Counsel failed to move to suppress evidence resulting from the warrantless police search of Mr. Maples's hotel room and failed to object to the admission of such evidence. The search was performed pursuant to an involuntary consent given by Mr. Tant, the manager of a Nashville motel where Mr. Maples stayed for three weeks prior to his arrest. At trial, the police produced a "waiver" signed by Mr. Tant, purportedly authorizing the search of his and Maples's room. (R. at 2449, 2466; State's Ex. 203, 204.) Mr. Tant testified that he signed the "waiver" while the police officers "were just all standing there with guns pointing at me . . . ." (R. at 2449.) Mr. Tant also testified to having a problem with signing the "waiver." Specifically, Mr. Tant testified that "[t]he problem to [him] at the time was all the police officers around [him] . . . ." (R. at 2449.) Consent to a search—whether given by the primary party or as third-party consent—must be freely given. See Windham v. State, 599 So. 2d 95 (Ala. Crim. App. 1992); Hubbard v. State, 500 So. 2d 1204 (Ala. Crim. App. 1986); McLemore v. State, 562

So. 2d 639 (Ala. Crim App. 1989). Due to the abovementioned police coercion, Mr. Tant's consent to search Mr. Maples's room was not freely given and evidence from this illegal search should have been suppressed.

69. Mr. Tant also lacked the authority to consent to or grant a search of items within the exclusive control of Mr. Maples, as hotel employees do not have the authority to authorize police searches of hotel rooms. See Stoner v. California, 376 U.S. 483, 487-88 (1964) (the Court found the argument that the hotel clerk consented to the search of the hotel room "unpersuasive"); Buchannon v. State, 554 So. 2d 477 (Ala. Crim. App. 1989), overruled on other grounds by, Pardue v. State, 571 So. 2d 333 (Ala. 1990).

70. The T-shirt seized during this illegal search contained an inflammatory and irrelevant slogan and was subsequently introduced at trial. (R. at 2533.) This T-shirt was the "poisoned fruit" of an illegal search, and was not admissible. Wong Sun v. United States, 371 U.S. 471 (1963). Had Counsel objected to the improper admission of Mr. Maples's T-shirt on the above mentioned grounds there is the reasonable probability that the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694. Had Counsel objected the appellate court would not have reviewed this issue under the stringent "plain error" standard. See Maples, 758 So. 2d at 24.

71. Counsel failed to move to suppress Mr. Maples's videotaped statement on the grounds that Mr. Maples's statement was coerced and involuntarily obtained after inadequate Miranda warnings and not the result of a knowing and voluntary waiver of his state and federal constitutional rights. (See

Paragraphs 196 to 198.) If the videotaped statement had not been introduced, there would have been insufficient evidence to support the capital counts.

72. These numerous and repeated failures of Counsel, individually and cumulatively, denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article 1, § 6 of the Alabama Constitution and under Alabama law. But for these failures there is a reasonable probability that Mr. Maples would not have been convicted of capital murder.

ii. Discovery Motions.

73. During a discovery hearing, Counsel failed to argue adequately for the release of records from the Alabama Board of Pardons and Parole of twenty potential witnesses, including Ms. Phillips, Ms. Davis, and Mr. Smith. At the hearing, Counsel (remarkably) failed to explain the relevance and materiality of these files, instead admitting that "we are wandering in a blind alley as far as what is in these files." (Ct. R at 429-429a.) What counsel should have explained is that these documents could have been used to impeach the credibility of the witnesses, reveal criminal connections between witnesses and potentially could have revealed exculpatory evidence, especially in light of Counsel's claim during closing argument that "what we have here . . . is that someone else was involved [in the shootings]." (R. at 2936.) Indeed, in the subsequent order denying Counsel's request, the Court noted Counsel's failure to explain the relevance and materiality of the files as "illustrative of a 'general fishing expedition.'" (Ct. R. at 429-429a). Such an apparent lack of knowledge of the law is ineffective

assistance of counsel and cannot be accorded deference as a reasonable trial strategy. See Finch v. Vaughn, 67 F.3d 909, 916 (11th Cir. 1995) (holding that counsel has a constitutional duty to "know or learn about the relevant law and evaluate its application to his or her client."); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).

74. In view of the failures and errors of Counsel detailed in Paragraphs 68 to 73 above, Mr. Maples was deprived of his right to be tried by an impartial jury, in violation of his rights protected under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under the Alabama Constitution and under Alabama law.

iii. **Jury Motions.**

75. Prior to trial, Counsel moved to request that the prospective jurors be individually questioned. (Ct. R. at 268.) The court denied this motion (R. at 133), and venire members were questioned in group settings. Counsel were ineffective for not requesting again individual *voir dire* in each instance when sensitive, volatile issues including, without limitation, pretrial publicity, prior knowledge of the facts and comments on the venire members' opinions about the death penalty, required sequestrated *voir dire* to prevent contamination of the entire panel and to preserve the impartiality of the jury. This was particularly critical here, where the case was subject to extensive pretrial publicity and attention. See Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985); see also Wood v. Woodham, 561 So. 2d 224 (Ala. 1989).

76. In this case, group *voir dire* tainted the jury with irrelevant and prejudicial facts about the case, thereby contaminating the entire jury venire. For example, during *voir dire* of the third panel, sworn

venire member Thomas Tefleller gave details of pre-trial publicity he had heard about prior to being called for jury service. (R. at 966-67.) Also, during *voir dire* of the fourth panel, sworn venire member Shirley Sharpley stated openly and on several occasions that she did not know if she could believe some of the witnesses she already knew: "I think it would be hard for me to believe – I don't know if I could distinguish whether they were telling the truth or not because I know their families and stuff." (R. at 1188.) In response to questions from Counsel, she repeated that "from [her] job, it would be hard for [her] to actually distinguish between whether they were telling the truth or not." (R. at 1235.) She even stated openly that she would give more weight to the testimony of police officers than to those of "the ones [the witnesses] that [she] [knew] through working." (R. at 1265.)

77. Counsel should have immediately objected to each of the abovementioned comments, requested that the entire third and fourth panels be struck and reiterated their request that a sequestrated *voir dire* be granted to guarantee anonymity and truthfulness of venire members' statements. However, Counsel failed to do so. But for Counsel's failure to object to said comments and failure to request sequestration, the result of Mr. Maples's trial would have been different.

78. In addition to the foregoing, Counsel requested that a jury questionnaire be sent to prospective jurors in advance of the jury selection. (Ct. R. at 198.) The court denied this motion, in part because Counsel conceded at the motion hearing that they could obtain the same information through *voir dire* examination without resorting to a jury questionnaire. (R. at 188.) This admission was unnecessary, unsubstantiated and

prejudicial to Mr. Maples's right to a fair jury selection. Furthermore, in each of the situations mentioned above in Paragraph 77, Counsel should have objected and reiterated a request for jury questionnaires to prevent any outside influence on the answers given by the venire members. But for Counsel's failure to object and failure to reiterate a request for jury questionnaires, the result of Mr. Maples's trial would have been different.

79. Overall, the group *voir dire*, combined with the absence of jury questionnaires, served to improperly influence other jurors in their answers, beliefs and biases. For instance, several venire members, like Katrina Selby (R. at 651), Susan Norwood (R. at 866-67), and Jimmy Quattlebaum (R. at 866-67), openly stated that they believed in the deterrent social effect of the death penalty. Upon information obtained through interviews with jurors, certain jurors may have been reluctant to admit any bias, especially with respect to their beliefs about the death penalty. And indeed, it is established that jurors "may be reluctant to admit any bias in front of [their] peers." Williams v. Griswald, 743 F.2d 1533, 1540 n.14 (11th Cir. 1984). In Mr. Maples's case, group questioning and the denial of jury questionnaires were highly prejudicial because venire members failed to truthfully answer all questions asked of them, thus denying Mr. Maples's right to have to an independent-minded jury. But for Counsel's failures, the result of Mr. Maples's trial would have been different.

80. Counsel were also ineffective for failing to challenge for cause various members of the venire who were familiar with law enforcement officers on the case, State witnesses, prospective jurors, counsel or

facts of the case. For example, juror Mr. Selby revealed that she knew Mr. Battles, the investigator who questioned Mr. Maples during his videotaped confession, and Roger Smallwood, a police officer on the case (R. at 476, 585); juror Quattlebaum mentioned that he was acquainted with Mr. Smallwood through his work (R. at 806); juror Leroy Beard mentioned that he knew investigator Greg Bartlett (R. at 1024-25), and police officer Joe Mann (R. at 1036); juror Sharron Harper revealed she knew police officer Jep Tallent (R. at 1262); and juror Sharpley mentioned she knew police officer and witness Nadis Carlisle, who testified about the photographs introduced as evidence by the State (R. at 1253-54). Shirley Sharpley also mentioned knowing people in the community, including Jimmy Chambers and Barbara Nicholas (R. at 1157), and some of the witnesses, such as Mr. Smith (R. 1158-59), through her work or family connections, and would not trust these witnesses, instead giving more weight to the testimony of police officers (R. at 1188, 1235, 1265); juror Peggy Keenum revealed she knew people living in the Mud Tavern area where Mr. Maples lived, including John Martin, who was announced to be a witness, and Dale McGregor, one of the witnesses and neighbor of the Maples (R. at 588-89); and juror Rebecca Sellers revealed that she knew Luke Skinner, a witness in the case (R. at 938-39). Juror Beard revealed at *voir dire* that he knew venire member Quattlebaum, having worked with him for over forty years. (R. at 989.) Paul Shoemaker revealed that he knew District Attorney Mr. Burrell through church. (R. at 476.) And Mr. Quattlebaum mentioned that he had discussed the case with a co-worker at the time of the shootings. (R. at 729.) Counsel should have struck for cause these venire members on the basis of these

statements, but failed to do so, thus depriving Mr. Maples of his right to a fair and independent jury.

81. These numerous and repeated failures of Counsel, individually and cumulatively, denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article 1, § 6 of the Alabama Constitution and under Alabama law. But for these failures there is a reasonable probability that Mr. Maples would not have been convicted of capital murder. This Court must now reverse Mr. Maples's conviction and sentence of death.

G. Counsel Failed to Adequately Question and Investigate Venire Members' Backgrounds.

82. Counsel were ineffective for failing to fully investigate facts revealed by venire members at *voir dire* and question them on a number of critical issues, thus failing to identify those of the venire members who should have been struck. Indeed, many jurors either knew witnesses, law enforcement officers involved in the case, State witnesses, prospective jurors, counsel or had in one way or another heard of the case prior to the trial. (See Paragraph 80.) Counsel should have inquired further into the nature and extent of each of these connections or acquaintances and should have been more systematic in their questioning. For instance, while juror Mr. Beard revealed he knew juror Quattlebaum, the latter did not disclose that he knew the former. Such inconsistency reveals Counsel's failure to systematically interrogate the jurors. Appropriate and thorough investigation would also have led Quattlebaum to reveal he was well acquainted with other venire members, including Betty Stephenson.

83. Similarly, many venire members mentioned they had heard of the case prior to the trial. Jurors Leroy Beard (R. at 964, 1069-70), Franklin Harvey (R. at 965, 1069-70), Quattlebaum, (R. at 729), Selby (R. at 519, 593), and alternate juror Ms. Sharpley (R. at 1187), all heard or read about the case prior to the trial. Counsel should have thoroughly questioned each of these venire members in order to determine the exact extent of their knowledge of the facts.

84. Had Counsel properly investigated the nature and potential impact of such prior knowledge or bias on each of these prospective jurors' ability to remain independent and impartial at trial, Counsel would have been able to challenge for cause some of these venire members and would have thus guaranteed that Mr. Maples be tried by a fair and independent jury.

H. Counsel Requested Verdict Forms that Were Inconsistent with the Strategy of the Defense.

85. Counsel were ineffective during the guilt phase for requesting verdict forms that were inconsistent with the strategy of the defense. Each of the two capital counts on the verdict forms contained two lesser included counts that the jury could consider in the alternative to the capital counts. During closing argument, Counsel suggested that the jury acquit Mr. Maples of some of these lesser included offenses. With respect to Count One, murder of two or more persons pursuant to one course of conduct, a capital count which contained two lesser included counts of intentional murder, Counsel told the jury that "[w]e are asserting that there is at least sufficient evidence as to one murder that he's guilty of and possibly two." (R. at 2939.) With respect to count two, the murder of Mr. Terry during a robbery ("Count Two" and,

together with Count One, the "Capital Counts"), a capital count which contained lesser included counts of intentional murder and first degree theft, Counsel told the jury that Mr. Maples did not rob Mr. Terry; instead the taking of the car "was a mere afterthought." (R. at 2925-26.)

86. However, immediately after closing arguments, Counsel asked the judge to submit only **guilty** verdict forms to the jury for the lesser included offenses. (R. at 2943-44.) As explained in Paragraphs 199 to 202, these improper verdict forms precluded the jury from doing exactly what Counsel had just urged them to do in their closing argument: find Mr. Maples **guilty** of one of the lesser included offenses within a Capital Count but **not guilty** of the other lesser included offense. Accordingly, the mechanism that Counsel purported to create through the verdict forms for jurors to give effect to their submissions was deficient and prejudicial to Mr. Maples's defense. See Penny v. Johnson, 121 S. Ct 1910 (2001); Freeman v. Class, 95 F.3d 639, 642-43 (8th Cir. 1996). But for Counsel's errors, the result of Mr. Maples's trial would have been different.

I. Counsel Failed to Adequately Investigate the State's Capital Murder Charge.

87. Counsel are under an obligation to thoroughly investigate any criminal case. This obligation becomes a heightened legal, moral and constitutional duty in the context of a capital proceeding where a man's life is at stake. See Gregg v. Georgia, 428 U.S. 153 (1976). "At the very heart of effective representation is the independent duty to investigate and prepare [the client's case]." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Indeed, in order to effectively prepare

for a capital trial, counsel must investigate every possible avenue, challenge all assertions by the State and subject the State's case to rigorous examination and testing. See Strickland v. Washington, 466 U.S. 668 (1984); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (finding ineffective assistance of counsel where defense failed to interview all potential alibi witnesses); Wade v. Armontrout, 798 F.2d 304, 306 (8th Cir. 1986) (finding ineffective assistance of counsel where the defense does "not investigate the prosecution's case, [and does] not investigate ... defense witnesses."); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) ("A substantial body of ... case law insists ... that effective counsel conduct a reasonable amount of pretrial investigation.") But for Counsel's failure to adequately investigate the State's capital murder charge, the result of Mr. Maples's trial would have been different.

88. Here, Counsel failed to make a complete, independent investigation of the case, and were thus reliant on the State's version of events. Counsel met with Mr. Maples on only a few occasions prior to trial. Upon information obtained from Mr. Maples, these few brief meetings were inadequate to obtain information from Mr. Maples about relevant witnesses and related information about the circumstances surrounding the shooting or to adequately inform Mr. Maples as to the status and progress of the case, in violation of the Alabama Rules of Professional Conduct. Ala. R. Prof'l Conduct 1.4(b) ("A lawyer shall keep a client reasonably informed about the status of a matter and shall promptly comply with reasonable requests for information.") And despite the fact that Mr. Maples's parents possessed information that would have been

useful to his defense, including information about Mr. Maples's drug associates and activities, as well as mitigating circumstances important to preparing for the possibility of a sentencing phase of the trial, Counsel briefly met with them on only two occasions and did not ask about said relevant information. Counsel also failed to meet with Mr. Maples's extended family prior to trial. Such failures either to interview adequately or to interview at all Mr. Maples and his family members, and the failure to reasonably inform Mr. Maples as to the status of the case, constitutes ineffective assistance of counsel. But for such failures by Counsel, the outcome of Mr. Maples's trial would have been different.

89. Counsel failed to investigate reports by the Maples family of strangers hiding outside their home on the night of the discovery of Barry Robinson's body. Counsel also failed to investigate a series of threatening phone calls and break-ins of the Maples residence that began after Mr. Terry's body was found and that continued even after Mr. Maples's arrest. These failures to investigate are especially ineffective in light of Counsel's claim during closing argument that "what we have here ... is that someone else was involved [in the shootings]." (R. at 2936.) At a minimum, Counsel failed to investigate these matters and to present these facts at trial to challenge the State's investigation of the case, especially in light of Counsel's claim during closing argument that "what we have here ... is that someone else was involved [in the shootings]." (R. at 2936.) But for Counsel's errors, the result of Mr. Maples's trial would have been different.

90. Prior to trial, Mr. Maples's parents showed Counsel that there were other bullet shells and casings

in front of the Maples's home in the same place where shells that were introduced at trial were found. These bullet shells and casings were present on the day of the shootings but not removed by the police. However, Counsel failed to introduce this evidence at trial to challenge the accuracy of the State's investigation. This evidence could at least have established the police did not properly investigate the crime scene.

91. Counsel made only a cursory attempt to meet several important witnesses, including but not limited to, Mr. Meinen and Mr. Foley, although Counsel knew about possible drug-related connections between them and Mr. Maples through various interviews with other people. Mr. Meinen was the roommate of Barry Robinson, one of the victims, and was with him on the night of the murders. Upon information and belief, Mr. Meinen left town immediately after the murders. Mr. Foley was allegedly a drug associate of Mr. Dobbs and Mr. Maples. Counsel did not try to find these witnesses, aside from preparing a standard subpoena for Mr. Meinen and Mr. Foley, determine their connection to the shootings or discover whether they could provide exculpatory information. Thus, Counsel's failure to investigate these individuals was ineffective assistance. See Miller v. Singletary, 958 F. Supp. 572 (M.D. Fla. 1997) (holding that counsel who failed to make further efforts to locate key witness beyond a single attempt to serve process was ineffective assistance). But for Counsel's failure to investigate these witnesses, the outcome of Mr. Maples's trial would have been different.

92. As detailed in Paragraphs 87 to 91 above, Counsel were constitutionally required to conduct an independent and thorough investigation of Mr.

Maples's alleged involvement in the victims' deaths, and their failure to do so rendered their assistance ineffective. See Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (holding that it is well settled law that failure to investigate adequately in preparation for trial constitutes ineffective assistance of counsel).

J. Counsel Failed To Prevent Or Even Object To Egregious Instances Of Prosecutorial Misconduct.

93. Counsel failed to adequately protect Mr. Maples's constitutional rights when they failed to object to the State's improper and prejudicial misconduct, including, but not limited to, improper reliance on statutory aggravating factors, highly inflammatory and prejudicial closing arguments, improper introduction of gruesome pictures and improper redirect examination of a witness. The cloak of the State's authority that envelopes the prosecutor may induce jurors to trust the prosecutor's opinion over that of defense counsel, or even their own, and as such, has a particularly prejudicial effect in a capital trial. See Berger v. United States, 295 U.S. 78 (1935); Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988).

i. Counsel Failed to Adequately Object to the State's Improper Reliance on a Statutory Aggravating Factor During Closing Arguments.

94. Counsel failed to adequately object when, during the State's closing arguments, the prosecutor improperly raised a statutory aggravating factor without giving notice to Mr. Maples that such aggravating circumstance would be applied to his offense. In a capital case, the aggravating circumstances that the State intends to use *must* be

alleged in the indictment in order to give the accused notice. See Windsor v. State, 683 So. 2d 1027, 1037 (Al. Crim. App. 1985) (citing Beck v. State, 396 So. 2d 645, 663 (Ala. 1980)). During closing arguments, the State, without presenting any evidence on this issue, argued that Mr. Maples shot Mr. Robinson in the cheek before "lean[ing] inside the car to put in the last shot *execution style* in the back of his head," (emphasis added). (R. at 2901.) Alabama statute provides that aggravating circumstances include situations where "the capital offense was especially heinous, atrocious or cruel compared to other capital offenses." Ala. Code § 13A-5-49(8) (1994). Thus, the prosecutor's unsupported description of the murders "execution style" fits this aggravating factor but since the State did not charge this aggravator in the indictment, its closing argument could only serve to inflame and prejudice the jury against Mr. Maples. Nevertheless, Counsel inexplicably failed to object to this obvious instance of prosecutorial misconduct, to the greater prejudice of Mr. Maples.

ii. **Counsel Were Ineffective for Failing to Object to Numerous Improper Statements or Acts of the State.**

95. Counsel failed to object to the numerous improper statements or acts of the State during the guilt stage of Mr. Maples's trial, including, but not limited to, statements about what the truth was in this case, statements about the message the jury ought to send to the society through a verdict of guilty, repeated reading of the indictment by the State, statements of personal beliefs and convictions by the prosecutor and comments on Mr. Maples's decision not to testify.

96. Counsel failed to object to the prosecutor telling the jury that "[t]he truth is in this case that Corey Maples [sic] is a murderer, a capital murderer." (R. at 2907.) The prosecutor also told the jury that it was his belief that Mr. Maples's case was a "death penalty case." (R. at 2950.) Such statements by the prosecutor are impermissible and prejudicial. "It is never proper for the prosecutor to state his belief in the guilt or innocence of the accused." Davis v. State, 494 So. 2d 851, 857 (Ala. Crim. App. 1986) (holding that arguments of the district attorney which include his own personal views "cross the line" of permissible argument) (citing Adams v. State, 198 So. 2d 255 (Ala. 1967); Ex parte Rieber, 663 So. 2d 999, 1014 (Ala. 1995); see also Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983) ("[E]ven a prosecutor may not properly express such a personal opinion as to the as to the defendant's guilt.") As well, the prosecutor exerts "enormous influence" on the jury, and accordingly must never assume the role of a witness or vouch for the strength of the State's case. Gilchrist v. State, 534 So. 2d 1120 (Ala. Crim. App. 1988); Ex parte Gilchrist, 466 So. 2d 991 (Ala. 1985). Indeed, the "mere possibility" of influence is sufficient to deprive the defendant of his right to trial by an impartial jury. Chancellor v. State, 282 So. 2d 242 (Ala. 1973).

97. Counsel also failed to object to the prosecution's statement that the jury should, through its verdict, send a message to the community. Indeed, the prosecutor urged the jury to "return a verdict of guilty and send that message back," (R. at 2907), thus inferring that the jury should take into account its impact on society in its reaching of a verdict of guilt. Such argument was highly improper, in that it was

irrelevant to the guilt or innocence of Mr. Maples and introduced inadmissible issues extrinsic to the crime. See Tucker v. Zant, 724 F.2d 882, 890 (11th Cir. 1984).

98. Counsel further failed to object to the repeated reading of the indictment to the jury by the prosecutor. (R. at 2970.) On two separate occasions the jury was informed that the district attorney signed the indictment. This reading of the indictment in this fashion was improper and prejudicial to Mr. Maples. Twice reading the indictment to the jury, once at the beginning and once at the end of the trial, informed the jury that another group had already considered the evidence against Mr. Maples's and had found him guilty of the charges. It also implied that the prosecutor had special knowledge of the case that other individuals, including the defense, lacked. Combining these factors may have given the jury the perception that others had found Mr. Maples guilty of the charges; that the prosecutor concurred with the findings on the indictment and that the sole purpose of the trial was to verify the indictment. Alabama law prohibits the district attorney from telling the jury that he or she believes that the defendant is guilty. See Crosslin v. State, 446 So. 2d 675, 680 (Ala. Crim. App. 1983). This proscription is imposed because the district attorney is a publicly elected official imbued with the public trust, "and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. "As such, he is in a very definite sense the servant of law." Berger v. United States, 295 U.S. 78, 88 (1935). There was no legitimate purpose to twice reading the indictment to the jury; such behavior only served to prejudice the jury against Mr. Maples.

99. Counsel failed to object to numerous instances when the prosecutor impermissibly stated its own views and convictions on the case, thus improperly influencing the jury. For example, the prosecutor stated: "I submit to you . . . we've proven the case . . . and if we haven't, I don't know if we ever would in any case," thus resorting to his own conviction about the issue at stake and using his own prior experience to support Mr. Maples's guilt. (R. at 2963.) The prosecutor also argued he had "no doubt" about the purpose of Mr. Maples when he checked the pulse of the victim, implying that this act demonstrated intent. (R. at 2903.) It is long-established that improper suggestions, insinuations, especially assertions of personal knowledge, notably by the prosecution, are not permissible. See Berger, 295 U.S. at 88. By doing so, the prosecutor could only contribute to diminish the jury's sense of responsibility. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

100. Counsel failed to object to the prosecution's improper comments, during his guilt-phase closing arguments, on Mr. Maples's decision not to testify. The prosecutor, referring to Mr. Maples's videotaped statement, informed the jury that "[t]here was an eyewitness and he told you what happened on tape." (R. at 2960.) This was a reference to Mr. Maples's silence: Mr. Maples, according to the State, was the only person present when Mr. Terry and Mr. Robinson were killed, and the only eyewitness to what occurred. Invoking Mr. Maples as the sole eyewitness to the crime and contrasting his videotaped statements with his courtroom silence was a clear allusion to his decision not to testify. See Ex parte Wilson, 571 So. 2d 1251 (Ala. 1990). Under Alabama law, "where there is

a possibility that a prosecutor's comment could be understood by the jury as a reference to failure of the defendant to testify, Article I, §6 [of the Alabama Constitution] is violated." Beecher v. State, 320 So. 2d 727, 734 (Ala. 1975); Witherspoon v. State, 596 So. 2d 617, 619 (Ala. Crim. App. 1991). The Fifth Amendment protection against self incrimination is so strong that any "prosecutor who even inadvertently makes reference to the fact that the defendant can testify is inviting reversible error." Tomlin v. State, 591 So. 2d 550, 556 (Ala. Crim. App. 1991) (citing Blackmon v. State, 462 So. 2d 1057, 1060 (Ala. Crim. App. 1985)).

101. Individually and cumulatively, Counsel's failure to object to the numerous improper statements or impermissible acts of the State indicate that Counsel "[were) not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Here, "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. These failures of Counsel denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Alabama law.

102. In addition, because of Counsel's failure to object to each of the above mentioned improper statements or acts of the State, the appellate court reviewed these instances of prosecutorial misconduct under the stringent "plain error" standard and ruled that none of them amounted to the level of plain error, thus rejecting the claim. See Maples v. State, 758 So. 2d 1, 60, 72 (Ala. Crim. App. 1999). But for Counsel's failure to object to these improper statements, the

outcome of Mr. Maples's trial would have been different.

iii. Counsel Were Ineffective for Failing to Argue Against the Admissibility of Highly Prejudicial Gruesome Photographs.

103. Counsel failed to adequately object to the State's extensive reliance on the presentation of numerous duplicative and unnecessary gruesome photographs, including close-ups of the victims. At trial, color slides of the autopsy of the victims were used and photographs were enlarged and projected onto a screen, including photographs of the victims after their heads had been opened by the pathologist. (R. at 2271, 2278-99.) The introduction of these totally non-probative cumulative and gory photographs could only inflame and unfairly prejudice the jury against Mr. Maples. Indeed, these photographs "serve[d] little or no purpose except to arouse the passion, prejudice or sympathy of the jury" and therefore should have been excluded from evidence. Ott v. Smith, 413 So. 2d 1129, 1132 (Ala. 1982).

iv. Counsel Were Ineffective for Failing to Object to the State's Improper Examination of Witnesses.

104. On numerous occasions, Counsel failed to object to the State's improper examination of witnesses. The State asked witnesses leading questions; examined witness without proper qualification; hearsay; and elicited irrelevant testimony from witnesses. Counsel's failure to object to these improper questions caused the appellate court to review them under the stringent "plain error" standard. See Maples v. State, 758 So. 2d 1, 59 (Ala. Crim. App. 1999).

105. Counsel failed to object when the prosecutor asked witnesses leading questions. For instance, in his direct examination of Jack Kalin, the State's toxicologist, the prosecutor questioned Mr. Kalin as follows: "You say there was no alcohol in the blood, is that right, *but there was some in the liquid in the eye.*" (R. at 2338.) Prosecutor then stated: "So that would tell you that a person had been drinking sometime ago and sort of worked it out of his blood, but it was still in his eye?" (R. at 2338.) Arguably in appreciation that the prosecutor had effectively answered his own question, Mr. Kalin replied "Oh, you [the prosecutor] should be on the stand." (R. at 2338.) Leading questions by prosecutors are improper as they place the prosecutor in the position of both an advocate and a witness. See Stewart v. United States, 366 U.S. 1, 8 (1961); Tomlin v. State, 591 So. 2d 550, 558 (Ala. Crim. App. 1991). Yet, Counsel failed to object to further leading questioning by the prosecutor. (R. at 1848, 2114, 2347, 2361, 2369.) As Counsel was "the only person the jury could have expected" to object to the leading questioning, Counsel's failure to object was ineffective. Ex parte Williams, 461 So. 2d 852, 854 (Ala. 1984). But for Counsel's failure to object to the prosecutors' improper questioning, the outcome of Mr. Maples's trial would have been different.

106. Counsel were ineffective for failing to object to the State's solicitation of hearsay evidence throughout the guilt stage of Mr. Maples's trial. The State's examination of witnesses was filled with hearsay that Counsel failed to object to. (R. at 423, 1624, 1639, 1953, 2077-81, 2477, 2491, 2492.) It was improper of the prosecutor to elicit hearsay testimony. See Boyd v. State, 246 S.E. 2d 396, 398 (Ga. Ct. App. 1978).

Counsel's conduct in failing to object to prejudicial hearsay testimony "fall[s] outside the wide range of professionally competent assistance." Daniels v. State, 650 So. 2d 544, 552 (Ala. Crim. App. 1994) (quoting Strickland, 466 U.S. at 688). But for Counsel's failure to object to hearsay evidence, the outcome of Mr. Maples's trial would have been different.

107. Counsel failed to object when the prosecutor elicited testimony from witnesses without proper foundation. The prosecutor elicited testimony from Ms. Davis, who was not home when Mr. Maples came to her house after the killings, that blood spots on a kitchen towel were "Twinky's blood." (R. at 1876). Ms. Davis was never qualified as an expert witness, and was thus incompetent to testify whether it was truly Mr. Terry's blood that was on the towel. Ms. Davis also repeatedly characterized materials found in her house as "evidence," (R. at 1874, 1875, 1876, 1879), and she referred to her house as a "crime scene," (R. at 1880). Thus, the State elicited what was, at best, improper speculative evidence from an unqualified witness. Counsel were ineffective for failing to object to this improper testimony, and but for Counsel's ineffectiveness, the result of Mr. Maples trial would have been different.

108. Counsel were ineffective for failing to object when the prosecutor asked questions without any proper basis. For example, during the redirect examination of Mr. Dobbs, the State asked the witness whether he would "be surprised if [he] learned as part of [Mr. Maples's] case that [Mr. Maples] was using other people to try to get to the use of their possession; trying to take advantage of people to be able to use their possessions." (R. at 2086.) Although the

prosecution lacked any proper basis for asking this question on redirect, Counsel failed to object.

109. Counsel were ineffective for failing to object to the State's elicitation of extraneous, irrelevant testimony from witnesses. During direct examination of Beverly Shawnbaum, who was at a bar with Mr. Maples and Mr. Terry prior to the murders, prosecutor asked, "[w]as Twinky, Stacy Terry, pretty proud of that car?" (R. at 1817.) For evidence to be relevant, it must have probative value "upon a matter at issue in the case." Phelps v. State, 439 So. 2d 727, 736 (Ala. Crim. App. 1983). Whether or not Mr. Terry loved his car was irrelevant to the charges against Mr. Maples. Counsel also failed to object to further irrelevant testimonies, including descriptions of Mr. Maples's tattoos, (R. at 2443), a description of Mr. Maples clothing as a "No Fear" T-shirt, (R. at 2532), and the introduction of a note from Mr. Maples thanking Mr. Tant for hosting him at the motel, (R. at 2546). These irrelevant testimonies could only have served to arouse the passion and prejudice of the jury. See Ott v. Smith, 413 So. 2d 1129, 132 (Ala. 1982). Given the numerous examples of Counsel's inefficient performance, there "is a probability sufficient to undermine confidence in the outcome" of Mr. Maples trial. Strickland, 466 U.S. at 694.

110. Individually and cumulatively, Counsel's failure to object to the numerous instances when the prosecutor improperly examined witnesses indicate that Counsel "[were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Here, "there is a reasonable probability that, but for Counsel's unprofessional error, the result of the proceeding

would have been different." Id. at 694. These failures of Counsel denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Alabama law. This Court must now reverse Mr. Maples's conviction and sentence of death.

II. COUNSEL WERE INEFFECTIVE DURING THE PENALTY PHASE OF CORY MAPLES'S TRIAL, AND THIS INEFFECTIVENESS RESULTED IN THE UNJUST AND UNCONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY.

111. It is absolutely essential that Counsel in a capital case fully investigated the history of Mr. Maples in preparation for the penalty phase of his capital proceeding. It is constitutionally required that the court and jury consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). This includes any evidence about the defendant's history and life that may be considered by the jury or judge as a mitigating factor. See Woodson v. North Carolina, 428 U.S. 280 (1976). Thus, Mr. Maples was entitled to have all aspects of his background, family life, medical history, school records and any other life experience that may be considered mitigating evidence presented to the jury and judge at the penalty phase of his capital trial. Counsel for Mr. Maples fell far short of this constitutionally required mandate.

112. Neither of Mr. Maples's trial counsel had ever conducted a second stage in a capital trial. In order to have prepared properly for the penalty phase of Mr.

Maples's capital trial, Counsel should have obtained complete and accurate information relevant to Mr. Maples's medical history, educational history, employment and training history, family and social history, correctional history and any religious or cultural influences. See American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1 (A)(2)(c)(adopted by the ABA house delegates Feb. 7, 1989).

113. Counsel for Mr. Maples failed to meet these minimum requirements of an adequate investigation. "At the heart of effective representation is the independent duty to investigate and prepare [the client's case.]" Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Counsel was under a clear duty to thoroughly investigate Mr. Maples's background in preparation for the capital penalty phase, and the failure to do so precluded the finding that absence of a penalty phase defense was strategic. See Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) (holding that counsel was ineffective for failing to request state hospital records, school records, social service records and failing to contact defendant's sister, neighbor or social worker); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986) (finding ineffective assistance of counsel where insufficient effort was made to investigate possible sources of mitigation evidence); Douglas v. Wainright, 714 F.2d 1532, 1556 (11th Cir. 1983) ("[P]ermissible trial strategy can never include the failure to conduct a reasonably substantial investigation.") (internal quotes omitted) (quoting Strickland, 693 F.2d at 1252); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) (finding that counsel did not

attempt to contact family members or prepare for the penalty phase until the trial was underway, and failed to put on any mental health mitigating evidence); Jackson v. Herring, 42 F.2d 1350 (11th Cir. 1995) (finding a presumption of prejudice where counsel made no effort to prepare for the penalty phase of a capital trial).

114. In this instance, effective preparation and investigation by Counsel would have revealed a host of mitigating factors which should have been presented at the penalty phase of Mr. Maples's trial. Among other things, Counsel would have learned of Mr. Maples's tortured childhood and history of mental illness among certain family members. Counsel would have learned of Mr. Maples's history of depression and suicide attempts and his efforts to overcome drug abuse. Counsel also would have learned about Mr. Maples's assistance of the police in their enforcement of drug law violations. Also, Counsel would have learned of the care and regard Mr. Maples's family, friends and others had for Mr. Maples. If the jury had learned of these issues, there is a reasonable probability that they would not have sentenced Mr. Maples to death. The failure to properly investigate and prepare for the penalty phase constitutes ineffectiveness, as it cannot be characterized as strategic. Therefore, this Court must reverse Mr. Maples's sentence of death.

A. Counsel Failed to Adequately Investigate Mr. Maples's Family History and Character References.

115. Counsel failed at trial, primarily due to their lack of preparation, to elicit highly relevant mitigating evidence regarding Mr. Maples's early tortured upbringing at the hands of his birth mother as well as

evidence indicating that Mr. Maples's birth mother and maternal grandmother probably suffered from mental illness. Counsel also failed to elicit evidence of Mr. Maples's overall good moral character despite the challenges facing him. Although Mr. Maples's parents spoke with counsel at length and provided counsel with the names of several parties, including neighbors, teachers, friends, and relatives, who had witnessed the abuse Mr. Maples suffered at the hands of his birth mother and could have testified to the effects of that abuse, counsel did not interview any of these parties or call them at the mitigation stage of the trial. With the exception of Dr. Allen Shealy, the only witnesses called by Counsel – Mr. Maples's father, step-mother, and uncle -- were those who happened to be present as observers at the trial proceedings, and Counsel did not prepare any of these witnesses at all. As a result, the testimony of these witnesses did little to convey the severely abusive circumstances of Mr. Maples's early youth. And Counsel offered nothing to convey the history of mental illness afflicting Mr. Maples's birth mother and grandmother. Had Counsel adequately interviewed the few witnesses they presented, they could have elicited important mitigating information regarding Mr. Maples's childhood and young adult life that was never adequately presented to the jury or the judge. Instead, Counsel only briefly interviewed Mr. Maples's father and step-mother and never interviewed his uncle. None of these witnesses were even aware that they might testify during the penalty phase until after the trial began, when Counsel went into the gallery during a break to inform them. This ineffective witness preparation resulted in testimony that failed to address, or only superficially addressed,

many mitigating factors that, if effectively presented, would have resulted in a different verdict.

116. At trial, the testimony of Mr. Maples's natural father, Philip Maples, did not adequately convey the trauma and abuse Mr. Maples suffered at the hands of his birth mother, nor did it address at all the mental illness afflicting Mr. Maples's birth mother and maternal grandmother. If Philip Maples had been examined more effectively, the judge and jury would have learned that Mr. Maples's birth mother, Denise Imgrund, was mentally unstable and subject to frequent violent outbursts. Ms. Imgrund would throw tantrums, often without warning or the slightest provocation, during which she would pull out her hair, scratch herself until she bled and pound the ground with her feet. She also frequently and violently attacked Mr. Maples and Philip Maples on a number of occasions. Once, Ms. Imgrund attacked Phillip Maples, without provocation, with a metal hairbrush while he was driving, causing his eye to bleed profusely. On another occasion, while entertaining friends at home, Ms. Imgrund suddenly swung a butcher knife at Philip Maples in an attempt to slit his throat. Philip Maples raised his arm to protect himself and suffered a gash from his shoulder to his elbow. In yet another violent outburst, Ms. Imgrund poured a skillet full of hot grease across Philip Maples's chest while he was sleeping. This incident finally compelled Philip Maples to leave the marriage. Had Counsel elicited this testimony, there is a reasonable probability that the jury would not have convicted Mr. Maples of death.

117. Philip Maples would have testified that Ms. Imgrund's behavior also extended to her few remaining friends, one of whom she chocked, again without

provocation, while drinking and socializing with a group of friends. Counsel made no attempt to contact any former friends or associates of Ms. Imgrund to provide testimony substantiating her violent and unpredictable behavior. If Counsel had elicited this testimony, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

118. Philip Maples would have further testified that Mr. Maples was also a frequent object of Ms. Imgrund's outbursts. In fact, from the time Mr. Maples was born, he became a focal point of Ms. Imgrund's attacks. One hot summer day when Mr. Maples was an infant, Ms. Imgrund locked him in a car outside a shopping mall with the car windows rolled up. A passerby saw Mr. Maples screaming and sweating and ran to find Ms. Imgrund, who claimed she lost track of time. On another occasion, Ms. Imgrund tied Mr. Maples's wrists to a chair and beat him with a broom handle. Philip Maples would also have testified that, shortly after he and Ms. Imgrund divorced, Mr. Maples's grandfather, Ms. Imgrund's father, told him to take Mr. Maples from Ms. Imgrund because he was afraid she would kill him. Philip Maples also could have testified that Ms. Imgrund attempted to sell Mr. Maples when Mr. Maples was three years old. Mr. Maples's grandfather also told Philip Maples that, when Mr. Maples was very young, he had seen Ms. Imgrund violently strangle him, leaving marks on Mr. Maples's throat. On another occasion, Philip Maples discovered that Mr. Maples had fingernail scratches on his face and neck from Ms. Imgrund's picking him up by the neck in a fit of anger. After Philip Maples took Mr. Maples in, Ms. Imgrund abandoned Mr. Maples, making little or no effort to contact him for the next thirteen years. At no time did

Counsel attempt to contact Ms. Imgrund, although her testimony would have revealed extensive mitigating circumstances, including additional evidence of her severe physical and mental abuse of Mr. Maples, as well as evidence of a history of mental illness in her family. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

119. Had Philip Maples's testimony been more thorough, the judge and jury could have learned more about Ms. Imgrund's second abandonment of Mr. Maples. She re-established contact with Mr. Maples when he was seventeen, and Mr. Maples eventually moved in with her. However, Ms. Imgrund often acted erratically and neglected and verbally abused Mr. Maples while he stayed at her home. Her traumatizing behavior continued until one evening, just two or three months after moving in with her, Mr. Maples arrived at her house to find that she had moved out and left all of his clothes on the steps. Following this second abandonment, Mr. Maples was depressed and hurt. During the brief time Mr. Maples lived with Ms. Imgrund, he dropped out of school. Counsel made no attempt to determine how such an abandonment affected Mr. Maples's mental and emotional health. Counsel's failure to present such testimony as described above prejudiced Mr. Maples and indicate that Counsel "[were] not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Here, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

120. Philip Maples also would have testified that Ms. Imgrund's mother shared the same mental illness as Ms. Imgrund. On several occasions, Philip Maples saw Ms. Imgrund's mother hit her husband and throw things across the room or tear things up. Philip Maples also saw Ms. Imgrund behave the same way towards her mother. These indications of a family history of mental illness/disease were never raised or pursued by Counsel. Counsel also made no attempt to Mr. Maples's grandfather, who was present at many of Ms. Imgrund's and Ms. Imgrund's mother's similar violent outbursts. If Counsel had presented such evidence of a history of mental illness in the Maples's family, the outcome of the sentencing stage would have been different.

121. In addition, Philip Maples could have testified to the jury and judge about Mr. Maples's good moral character despite his abusive childhood. He would have testified that Mr. Maples played team sports like Little League baseball and Pop Warner football as a child and that he continued playing football and baseball in high school. Mr. Maples also rode quarter horses and won ribbons for riding competitions from the time he was eight years old until he was sixteen. In addition, Mr. Maples went to church regularly until he was twelve or thirteen years of age. Counsel made no attempt to contact any sports coaches, teammates or anyone at the Maples's church who could testify as to Mr. Maples's involvement at church, including his baptism and participation in church events. The cumulative effect of Counsel's failures to present such evidence resulted in prejudicing Mr. Maples. If this evidence had been presented, there is a reasonable

probability that the jury would not have sentenced Mr. Maples to death.

122. If Counsel had thoroughly interviewed Mr. Maples's step-mother, Elyse Maples, they would have learned much more about how Ms. Imgrund abused Mr. Maples as a child and the impact that her abuse had on Mr. Maples as he grew older. After Philip Maples divorced Ms. Imgrund and began dating Ms. Maples, Ms. Imgrund continued to spend time with Mr. Maples occasionally. One weekend, after Mr. Maples returned from a visit, Ms. Maples found scratches on his neck. Mr. Maples told her that Ms. Imgrund had scratched him but that it was his fault. After Ms. Imgrund's initial abandonment, Mr. Maples cried for his mother until his early teenage years. Often, Ms. Maples would sit with Mr. Maples at night because he had nightmares and would ask about his mother. Ms. Maples also would have provided more details about the circumstances leading up to Ms. Imgrund's second abandonment of Mr. Maples. The first weekend after Mr. Maples moved in with Ms. Imgrund, Ms. Imgrund called Ms. Maples and told her she didn't want Mr. Maples there over the weekend. This happened frequently thereafter. Ms. Imgrund would sometimes even throw Mr. Maples out during the week. During the brief time Mr. Maples lived with Ms. Imgrund, he dropped out of school.

123. In addition, Ms. Maples would have testified to Mr. Maples's history of witnessing traumatic events, as well as to Mr. Maples's past head traumas and related injuries requiring emergency medical treatment, including a fall off a 20-foot cliff. Ms. Maples also would have testified that despite dropping out of school, Mr. Maples still strove to live a successful and productive

life. He passed the high school equivalency exam (the "G.E.D.") with high enough marks to qualify for admission to the University of Alabama in Huntsville. Subsequently, Mr. Maples tried to enlist in the Army, but his drug abuse problems prevented him from successfully enlisting. The cumulative effect of Counsel's failures to present such evidence prejudiced Mr. Maples. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

124. Counsel's examination of Mr. Maples's paternal uncle, James Kenneth Maples, was brief, cursory and ineffective, consisting primarily of the comment that "Cory was okay." (R. at 3190.) Revealing an inexcusable lack of preparation, Counsel discovered during James Maples's testimony that he did not even know Mr. Maples's birth mother ("I met her maybe once or twice"). (R. at 3190.) If Counsel had interviewed other relatives, such as Mr. Maples's paternal uncles Lee Daniel, Leon Ferrell or Fred, Dale and Clint Ray, or his paternal aunts Margaret Daniel or Dianne Ferrell, his cousin Shannon Ferrell or his brother Daniel Maples, they would have learned about Mr. Maples's good moral character and friendliness. Family members would have told Counsel that Mr. Maples spent many of his summers playing with his cousins and regularly attended church. Counsel also would have learned more about Ms. Imgrund's erratic nature. The Daniels could have told Counsel that until Mr. Maples reached the age of thirteen, he would spend his summers over at the Daniels' home, where he would play with his cousins and regularly attend church. When Mr. Maples was two, the Daniels even considered adopting him in order to rescue him from

his abusive birth mother. The Daniels would have testified to Ms. Imgrund being "flaky" and "off the wall."

125. The Ferrells have also known Mr. Maples all his life. Shannon Ferrell would have testified that Mr. Maples could be a lot of fun and that he never looked down on anyone. The Ferrells would have testified that Ms. Imgrund did not like taking care of Mr. Maples, often leaving him with neighbors. In addition, Diane Ferrell once saw Ms. Imgrund slap Mr. Maples because he was crying. The Rays would have testified that until Mr. Maples was seventeen, he spent nearly every weekend at their home. When Mr. Maples was younger, he would ask the Rays why his birth mother wasn't around, and they would try to make him understand that it wasn't his fault that she left him. The Rays also were witnesses to the effects of Ms. Imgrund's mental illness. Once, the Rays and Ms. Imgrund were chatting in the kitchen when Ms. Imgrund suddenly became angry for no apparent reason, and stormed out of the room. Dale Ray also noticed that Ms. Imgrund was both physically and emotionally distant from Mr. Maples. In addition, at least one family member saw Ms. Imgrund physically abuse Mr. Maples. Other family members saw Ms. Imgrund act erratically towards themselves and their friends. The cumulative effect of Counsel's failures to present such evidence prejudiced Mr. Maples. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

126. Daniel Maples would have testified that Mr. Maples was a fun, loving brother who respected his father and did what he was told to do. Daniel would

also have testified that Mr. Maples looked after him and did not allow Daniel to hang around Mr. Maples's drug associates. Mr. Maples also discouraged Daniel from using drugs. Daniel also would have testified about Mr. Maples told him that, when Mr. Maples was two, Ms. Imgrund left him alone in a pool until Philip Maples returned from work and found him there. The cumulative effect of Counsel's failure to present such evidence prejudiced Mr. Maples. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

127. If Counsel had interviewed teachers, counselors and coaches at Mr. Maples's high school, they would have learned about Mr. Maples's strong character and morals. Gaye Lenhart, Mr. Maples's guidance counselor in high school, would have testified that, while Mr. Maples struggled academically in high school, during his senior year he dedicated himself to graduating on time and, after graduation, seeking employment in a technical trade. Mr. Maples took an extremely challenging course load during the first semester of his senior year, but unfortunately did not successfully complete it. Subsequently, Mr. Maples dropped out at the beginning of winter term, joining 20% of his classmates who also dropped out prior to graduation. But Mr. Maples was hopeful he could find employment in a technical trade, having attended Brewer Vocational School during his junior year for training in electrical engineering. Mr. Maples had relatively few absences and very few disciplinary problems during his time in high school. Ms. Lenhart also found Mr. Maples exceptionally easy to talk to and very polite. If Counsel had contacted Glen Lang, Mr.

Maples's high school football and golf coach, they would have learned that although Mr. Maples was not a very good golf player, he tried hard and always did what he was told. Mr. Lang never had a problem with Mr. Maples and remembered that he was very friendly and polite. Not only did Counsel fail to contact Ms. Lenhart, Mr. Lang or any other school administrator or teacher, they never even requested Mr. Maples's academic records. The cumulative effect of Counsel's failures to present such evidence prejudiced Mr. Maples. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

128. If Counsel had interviewed Mr. Maples's friends, including Chris Basden, Kenneth Hall, Mike and Kathy Hall or Sam Frost, they would have learned how friendly and well-mannered Mr. Maples was as a youth and how, although he became more difficult as he battled a drug addiction, just prior to the shootings Mr. Maples seemed to have conquered his drug problems. Mr. Basden, Mr. Maples's childhood friend, would have testified that although Mr. Maples portrayed a "tough guy" image, he was a "softy" on the inside. Mr. Basden stayed friends with Mr. Maples throughout Mr. Maples's drug use and often talked to him about getting off drugs. Mr. Basden also met Mr. Maples's birth mother prior to her second abandonment of Mr. Maples and saw how happy he was to finally be reunited with her. He also watched Mr. Maples's fall into drugs after she abandoned him the second time. Evidence will show at the hearing that Counsel knew about Mr. Basden through other interviews and that Counsel considered Mr. Basden would be an appropriate witness for the second stage.

Nevertheless, Counsel failed to contact Mr. Basden or any of Mr. Maples's friends to provide testimony as detailed above. If this evidence had been presented, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

129. Mr. Basden could have also revealed positive aspects of Mr. Maples's character even during his time of drug dependence. On one occasion he and Mr. Maples had a disagreement that led to a fight, but less than a week later Mr. Maples came to Mr. Basden's home and apologized for the fight and the two resumed their friendship. Mr. Basden also would have testified that, shortly before the shootings, he saw Mr. Maples and noticed that he seemed "normal" again, healthier and seemingly over his drug addiction. Evidence will show at the hearing that Counsel knew about Mr. Basden's friendship with Mr. Maples through other interviews, that Counsel considered Mr. Basden would be an appropriate witness for the second stage, and that nonetheless Counsel failed to ask Mr. Basden to testify during the sentencing phase. Kenneth Hall, another friend since childhood, would have told Counsel that Mr. Maples looked much healthier just prior to the shootings. If Counsel had interviewed Mike and Kathy Hall, Mr. Hall's parents, they would have found out that Mr. Maples was very respectful to the Halls and even called Ms. Hall "Mom." Counsel would have learned that Mr. Maples used to spend time with his friends on the Halls' property, playing baseball, basketball, go-carts and other outdoor activities. Mike and Kathy Hall both remembered that Mr. Maples had some problems with drugs, but they also noticed that, just prior to the shootings, Mr. Maples looked like he had "gotten his act together."

Mr. Frost, Mr. Maples's high school friend and a county jailer when Mr. Maples was arrested after the shootings, would have told Counsel that Mr. Maples was generally happy in high school and never got into fights, and would have indicated to Counsel that Mr. Frost's brother, Mr. Maples's classmate, Mr. Frost's grandmother and other relatives could have testified to the same effect. Mr. Frost could have testified that, knowing Mr. Maples's character, he did not believe Mr. Maples could have committed the crimes. Mr. Frost also could have testified to Mr. Maples's demeanor after his incarceration. Mr. Frost still considers Mr. Maples a friend and would have been more than willing to testify on his behalf if Counsel had asked him to do so. Counsel's failure to present such testimony as described in Paragraphs 115 to 128 above prejudiced Mr. Maples and indicate that Counsel "[were] not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Here, "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694.

B. Counsel Failed to Adequately Investigate Mr. Maples's Drug Addiction, Depression and Attempted Recovery.

130. Counsel did not interview any witnesses about Mr. Maples's depression and suicidal behavior, including suicide attempts, prior to the shootings, when Mr. Maples was abusing crack cocaine, crystal methamphetamine, LSD and other drugs. Ms. Maples would have testified that Mr. Maples wrote poetry about depression and loneliness. He even left a suicide note stating that he had always been a screw-up. After discovering the note, Ms. Maples found Mr. Maples

hiding in the woods. Mr. Maples's ex-girlfriend, Ms. Davis, could have testified that around 1994 she was with Mr. Maples when he took over thirty sleeping pills and drank a bottle of alcohol just before crashing Ms. Maples's car. Mr. Dobbs, a friend of Mr. Maples, also could have testified that he witnessed Mr. Maples play Russian roulette on at least one occasion, sticking a gun into his mouth and pulling the trigger. Mr. Dobbs could also testify that he saw Mr. Maples attempt suicide by slashing his wrists with a butcher knife. Both Ms. Maples and Philip Maples could have more thoroughly testified to Mr. Maples's dedication to conquering his drug problems. In 1995, Mr. Maples voluntarily applied and was admitted to Quest Recovery Center, a non-residential drug treatment program in Morgan Country. Counsel never contacted any of the counselors at Quest who interacted with Mr. Maples. If such evidence had been presented, the jury would have learned about Mr. Maples's mental state at the time of the shootings. Counsel's failure to present such evidence prejudiced Mr. Maples and, if the evidence had been presented, there is a reasonable probability that the jury would have returned a different sentence.

131. Prior to the shootings, Mr. Maples went to Tennessee to work with a friend, Allen Birdsong, and escape the drug culture he was caught up in. Mr. Birdsong would have gladly testified to the hard working character Mr. Maples demonstrated while he and Mr. Maples were together in Tennessee. Mr. Maples's hardworking character also would have been a mitigating factor. See Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991) (finding that the fact that defendant was a "hard worker" was mitigating

evidence), cert. denied, 503 U.S. 952 (1992). However, Counsel failed to elicit such testimony from Mr. Birdsong during the penalty phase of Mr. Maples's trial and failed to even contact any other employer who could have testified to Mr. Maples's hard working moral character. But for Counsel's error, there is a reasonable probability that the jury would have returned a different verdict.

131A. Counsel had in their possession Mr. Maples's application to Quest that chronicled his past drug use, his suicide attempts and his desire to improve his life, but Counsel inexplicably failed to submit the application into evidence, nor did they contact any of the counselors at Quest who interacted with Mr. Maples, including Kathy Goodwin, the director of Quest who initially interviewed Mr. Maples for admission into the program. If Counsel had contacted Ms. Goodwin or any other counselors at Quest and presented their testimony, there is a reasonable probability that the jury would have returned a different sentence. Such a failure to contact and present these witnesses prejudiced Mr. Maples and, as there is a reasonable probability that the jury would have returned a different sentence if they had heard such evidence, constitutes ineffective assistance of counsel.

132. Because Counsel failed to adequately interview and present the testimony of those few witnesses that they did call at the penalty phase and did not call many potential witnesses who were sources of important information about Mr. Maples's life, as was detailed in Paragraphs 115 to 131A, Counsel were unable to present an adequate picture of Mr. Maples's life to the jury. Thus, Counsel were unable to articulate to the jury any coherent reason why the jurors should refrain

from sentencing Mr. Maples to death. If Counsel had called these witnesses and properly presented this evidence, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

C. **Counsel Failed to Obtain the Services of a Mitigation Expert.**

133. [Paragraph intentionally omitted.]

134. Counsel were also ineffective for failing to obtain the services of a mitigation expert who would have testified to the lingering psychological impact that growing up in an abusive family environment had on Mr. Maples. A mitigation expert would also have developed a social, medical and family history of Mr. Maples, identified and interviewed character witnesses, collected records, investigated possible psychological or neurological issues and helped to support motions for other experts or to develop exhibits to assist in presenting the issues to the court and jury, as well as searched for crucial mitigation witnesses such as Ms. Imgrund. Counsel failed to obtain these services even though a year before trial the Alabama Prison Project offered to help with providing a mitigation specialist. As mentioned earlier, neither of Mr. Maples's trial counsel had ever conducted a second stage in a capital trial. If Counsel could not investigate the issue themselves or did not have time to investigate Mr. Maples's mitigating factors, they needed to obtain the services of a mitigation expert, as was their right under Ake and its progeny. Under these circumstances, where Counsel clearly lacked the experience and ability to adequately investigate potential mitigating factors, it was ineffective for Counsel to fail to procure the services of a mitigation expert who specialized in obtaining the

materials necessary to properly represent a client in the second stage of a capital murder trial. Counsel knew for well over a year before the trial that such help was available, yet did nothing to request funds for or to hire such expert help. Not only did Counsel fail to hire an expert to help them or to do these things for them, Counsel utterly failed to do these things themselves. As a result, Mr. Maples proceeded to the second stage of his trial with Counsel who were woefully unprepared to present his case for mitigation to the court and the jury. This decision was not strategic; it was ineffective. See Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995). But for Counsel's failure to hire a mitigation expert, the outcome of Mr. Maples's sentencing phase would have been different.

D. Counsel Failed to Present Evidence of Mr. Maples's Assisting the Police in Their Enforcement of Drug Law Violations.

135. Counsel were ineffective at the penalty phase of the trial by setting forth mitigating factors but then failing to present any substantial evidence in support of those factors. In particular, Counsel failed to present any substantial evidence in support of the non-statutory mitigating factor that Mr. Maples cooperated and assisted the police in their enforcement of drug law violations. Counsel failed to present any substantial evidence even though, at least five months prior to trial, Counsel received documentation that clearly and incontrovertibly documented Mr. Maples's assistance to the Decatur Police in the arrest of a prominent drug dealer. A jury can consider "*as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less

than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (italics included). Given the importance of having the jury consider ANY aspect of a defendant's character or record during the penalty phase of a death penalty case, it is inexcusable for Counsel to possess incontrovertible evidence in support of a mitigating factor and fail to present it. Such an unreasonable decision falls below the minimum standard of effective assistance and cannot be considered reasonable trial strategy. Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995). If such evidence had been presented to the jury, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

136. The only evidence Counsel presented in support of this mitigating factor was the testimony of Mr. Maples's step-mother, who told the court that "Mr. Maples had worked with the Decatur city police to catch somebody with some drugs." (R. at 3184.) No other evidence or testimony was offered.

137. During closing, the prosecution scoffed at Counsel's attempt to present this evidence in support of this mitigating factor:

> [Mr. Maples] didn't clean up drugs in the City of Decatur. If he had made a mark over there or done anything major, they would have police officers and narcotics officers over here to tell you about it. Defense lawyers love to call police over here to testify. I mean, if they can get a police officer to come to their side, they are just tickled pink, and they would have been over here by the hand full. (R. at 3292-93.)

Likewise, in the sentencing order, the court judge determined that Mr. Maples had not cooperated and

assisted law enforcement authorities in their enforcement of drug laws. "The court notes no police officer testified at trial, nor was there any corroboration of the step-mother's testimony." (Sentencing Order at 10.)

138. If Counsel had investigated and presented available evidence in their possession, the court and the jury would have read a case report filed with the Decatur Police Department, written by Lieutenant Larry Greene, detailing Mr. Maples's assistance in the October 1994 arrest of Mark Carroll, who died before the trial, for unlawful distribution of controlled substances. The case report includes transcripts of conversations recorded by Mr. Maples over the course of several weeks, between himself and Mr. Carroll, including a conversation in which Mr. Maples purchased the drugs from Mr. Carroll that resulted in his immediate arrest. The case report lists many other officers involved in this transaction who could have testified on Mr. Maples's behalf, including, but not limited to, Detective Greene, Sergeant Larry Glover, Lieutenant Frank DeButy, Investigator Chris Matthews, Officer Denise Stogner, Officer Proncey Robertson and Investigator Faron White, along with other investigators of the Decatur Police Narcotics Unit and the Morgan County Drug Unit. If this evidence had been presented to the jury, there is a reasonable probability that the jury would not have sentenced Mr. Maples to death.

139. As detailed in Paragraphs 135 to 138, Counsel's failure to advocate for their client at sentencing, when the sentence was death, was equivalent to providing no representation at all at a critical stage of his trial. See United States v. Cronic, 466 U.S. 648, 659 (1984). Had

the jury and court heard this evidence, they would have been less inclined to impose death, and much more inclined to impose a sentence of life without the possibility of parole.

E. Counsel Failed to Procure a Competent Psychological Evaluation.

140. Counsel hired a psychologist to evaluate Mr. Maples's mental state both at the time of the crime and at the time of his arrest. The psychologist's evaluation, as detailed in Paragraphs 141 to 146 below, was woefully inadequate, which should have been apparent to Counsel. In addition, Counsel's presentation of the psychological evaluation to the jury was confusing and misleading and, upon information obtained through interviews with jurors, may have resulted in the jury's discounting much, if not all, of the psychologist's testimony.

141. Counsel failed to inform the psychologist of important facts and circumstances in Mr. Maples's background (See Paragraphs 115 to 131A, 147 to 150), thereby assuring that even if the psychologist had done his job properly, he could not have done it well.

142. The psychologist retained by Counsel spent very little time with Mr. Maples. And he spent no time at all with any family members or people who knew Mr. Maples other than a former schoolmate who -- fortuitously for the psychologist -- happened to be working in the jail the afternoon the psychologist went to the jail to interview Mr. Maples. According to the psychologist's testimony, he spent only four hours at the jail, conducted only two tests -- one a simple intelligence test -- and based his entire evaluation only on Mr. Maples's direct reporting to him. And even that reporting was skimpy and incomplete because of the

psychologist's superficial interaction and failure to probe, as was apparent during his confusing and inadequate testimony.

143. As a result, the psychologist failed to discover, for example, that Mr. Maples had suicidal thoughts and had, in the past, attempted suicide. He failed to discover that Mr. Maples was being given an anti-depressant while he was in the Morgan County jail and failed to learn the reasons why Mr. Maples had been prescribed such medication. He failed to discover more instances of his birth mother's physical abuse and abandonment when he was a small child, instances Mr. Maples had suppressed, but which were well known by his father and other family members. He failed to discover the long-standing pattern of self-destructive and abusive behavior by Mr. Maples's birth mother and maternal grandmother, possibly indicative of genetic mental illness or disease. He failed to probe Mr. Maples's feelings about his birth mother, either as he remembered her from his childhood, or when he met her again as a teenager. He also failed to probe Mr. Maples's feelings when she abandoned him a second time as a teenager. And, of course, he could not have known many other facts about Mr. Maples's background, as outlined in Paragraphs 115 to 131A and 147 to 150, because Counsel never informed him of those facts.

144. Based on this superficial and inadequate psychological evaluation, which Counsel should have recognized as superficial and inadequate, the psychologist incorrectly concluded and testified that Mr. Maples had passive-aggressive personality disorder. (R. 3149.) Equally damaging to Mr. Maples's defense was the defense psychologist's assertion, on

both direct and cross-examination, that there was virtually no difference between his evaluation and the prosecution psychologist's evaluation of anti-social personality disorder. (R. 3158.) He testified to this in spite of the fact that the prosecution psychologist's evaluation was patently incorrect under the diagnostic criteria set forth in the standard psychological manual, the Diagnostic and Statistical Manual IV.

145. Counsel should have engaged a psychologist who could carefully and thoroughly evaluate Mr. Maples's mental state and who could explain that mental state and its causes to the jury. In addition, Counsel should have thoroughly investigated Mr. Maples's family, social, medical and life history and shared all they learned with the psychologist. But Counsel did neither of these things, and as a result, they obtained a severely limited and compromised psychological evaluation. In addition, their inadequate preparation of the psychologist to testify resulted in his testimony being confusing, difficult to follow, misleading and completely devoid of any explanation of Mr. Maples's flat affect. Upon information learned from interviews with jurors, because of the superficiality of the psychologist's evaluation, and the inadequate presentation of his testimony by Counsel, some of the jurors may have discounted the psychologist's testimony.

146. It was Counsel's legal obligation to obtain, adequately prepare, and properly question an expert for the mitigation phase of Mr. Maples's trial. They failed completely in this task. Such a failure cannot be strategic. Instead, Counsel's failure was ineffective assistance of counsel and deprived Mr. Maples of his right to a reasonably substantial penalty phase

investigation. See Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995).

F. Counsel Failed to Investigate Mr. Maples's Post-Arrest Behavior.

147. Counsel also failed to investigate Mr. Maples's good behavior while in jail. If Counsel had investigated this issue, they would have discovered that Mr. Maples had been consistently well-behaved during more than two years of incarceration in the Morgan County jail from his arrest in 1995 to his trial in 1997. Records of Mr. Maples's incarceration would have shown that his behavior was good throughout his time in the county jail. At trial, witnesses from the county jail staff would have testified to the accuracy of the records and to Mr. Maples's good behavior. In particular, Mr. Frost, a jailer during Mr. Maples's incarceration, whom Counsel never attempted to contact although he knew about Mr. Frost and his friendship with Mr. Maples, would have testified as to Mr. Maples's good behavior in jail after his arrest. Such evidence clearly constitutes a mitigating circumstance as a matter of law. See Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (holding that defendant's prior good behavior while incarcerated is a mitigating factor); Lockett v. Ohio, 438 U.S. 586 (1978).

148. Mr. Maples's good behavior is especially significant because county jails are not intended as places for such long term incarceration and consequently are not usually equipped with facilities and resources for activities and outdoor exercise. Nor do they provide any other way for the prisoners to relieve the tedium of their confinement. That a young, vigorous man could remain a good prisoner under these

conditions would have been important for the jury to hear and consider and, but for Counsel's failure to investigate and present evidence of such behavior to the jury, there is a reasonable probability that Mr. Maples's would have been sentenced to life without the possibility of parole rather than death.

G. **Counsel Failed to Investigate Post-Arrest Medical Issues.**

149. Had Counsel investigated, they would have learned that Mr. Maples had such extreme nightmares while in the county jail that he was prescribed the anti-depressant Elavil for six months. This information, too, would have been important for the jury to know, especially in light of the fact that Counsel did not explain to the jury Mr. Maples's flat affect, which, upon information obtained from interviews with jurors, may have negatively impacted some jurors. In addition, this information would have been important because the State disputed Mr. Maples's claim of remorse over the shootings. The State argued, in response to Mr. Maples's claim that he was haunted by images of the murders, that it "sounds good but there has not been any evidence to support that; not one bit." (R. at 3287-88.) Counsel's failure to investigate these post-arrest medical issues prejudiced Mr. Maples; if this information had been available to the jurors, there is a reasonable probability that a different verdict would have resulted.

H. **Counsel Failed to Investigate Mr. Maples's Physical Trauma.**

150. Counsel were ineffective for failing to discover that Mr. Maples had suffered a number of traumatic head injuries, including, a fall off a twenty foot cliff onto rocks when he was a teenager and having been hit

with a baseball bat during an attack on him the year before the shootings. Although documentary and other evidence in the form of hospital records and oral testimony from Ms. Maples and from friends who were with Mr. Maples during these incidents was available, Counsel did not use this information in any way. If the jurors had been aware of these traumas, or if the psychologist had adequately explained the impact of these traumas upon Mr. Maples's behavior and mental state, there is a reasonable probability that Mr. Maples would not have been sentenced to death.

I. **Counsel Failed to Prevent or Otherwise Object to Egregious Instances of Prosecutorial Misconduct.**

151. Counsel failed to adequately protect Mr. Maples's constitutional rights when they failed to prevent or otherwise object to the State's highly improper and prejudicial misconduct, including, but not limited to, highly inflammatory and prejudicial closing arguments consisting of telling the jury what they should think, improper invocation of the social value of Mr. Maples's death, improper invocation of the victim's family's views on the case, numerous misstatements of the law, repeated accusations by the State that Mr. Maples lied and improper comments on Mr. Maples's courtroom demeanor and decision not to testify. By virtue of the authority vested in their office, opinions and statements by prosecutors are highly relied upon by jurors; improper suggestions and insinuations are thus particularly prejudicial to the accused. See Berger v. United States, 295 U.S. 78 (1935); Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1998).

152. Counsel failed to object to the State telling the jury what they should think. The prosecutor

improperly told the jury what he believed the jurors thought about certain aspects of the case. With respect to a 911 phone call allegedly made by Mr. Maples shortly after the shootings, the prosecutor argued that "there is no question that he made that phone call, I don't think, and I don't think this is in *your* minds either," (emphasis added). (R. at 3292.) Furthermore, the prosecutor told the jury that they had to believe that the death penalty is a deterrent: "you *have* to believe that [the death penalty] deters other criminal conduct, at least sometimes," (emphasis added). (R. at 3304.) If the prosecutor is barred from telling the jury what *he or she* believes, then he is also barred from telling the jury what the jurors should believe. However, Counsel failed to object to the prosecutor's highly improper and prejudicial closing arguments. See United States v. Young, 470 U.S. 1, 8 n.6 (1985) (finding that trial counsel's failure to object to prosecutor's expressions of personal opinion has a tremendous influence on the jury and constitutes ineffectiveness).

153. Counsel failed to object to the improper and prejudicial argument of the prosecution that Mr. Maples's death was more useful than a life in prison, because of the alleged deterrent effect of the death penalty. The prosecutor stated that, in the context of death sentences, "deaths [are not] completely in vain," that Mr. Maples's "life was much more valuable to lose than for him to keep," and that "his death might save one person somewhere sometime." (R. at 3304.) Such allegations of the social deterrent effect of the death penalty, which was not supported by any evidence, minimized the awesome sentencing decision the jurors are required to make. See Caldwell v. Mississippi, 472

U.S. 320, 341 (1985); Taylor v. State, 666 So. 2d 36, 50 (Ala. Crim. App. 1994) (finding that comments that lessen the jury's sense of responsibility "tend[ed] to encourage irresponsibility on the part of the jury in reaching its sentencing recommendation"). Nevertheless, Counsel failed to object to these improper and prejudicial closing arguments of the prosecution.

154. Counsel failed to object to the State's improper comment on Mr. Maples's failure to offer specific witnesses. The prosecutor rebutted the invocation by the defense of Mr. Maples's cooperation with the police as a mitigating circumstance by arguing that the defense failed to provide the testimony of police and drug enforcement officers corroborating the facts: "if [Mr. Maples] had made a mark over there [the Decatur police], [the defense] would have police officers and narcotics officers over here to tell you about it." (R. 3292-93.) Under Alabama law, the defense has the burden to "interject" mitigating facts, but then "once it is interjected the State [has] the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Ala. Code § 13A-5-45(g) (1994); see also Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991); Williams v. State, 710 So. 2d 1276 (Ala. Crim. App. 1996). Here, Counsel properly "interjected" the mitigating fact by providing Ms. Maples's testimony. (R. at 3184.) The State then decided not to cross-examine this witness. (R. at 3187.) However, the burden of proof shifted to the State upon interjection by the defense of the mitigating circumstance. It was thus improper for the State to make the above mentioned comment when it openly

refused to challenge the evidence provided by the defense to support the mitigating factor.

155. Counsel also failed to object to the improper invocation by the prosecutor of the victim's family's views on the appropriate punishment. (R. at 3303.) It is established that the views of the victim's family about the desired sentence cannot be introduced in a capital trial. See, e.g., Payne v. Tennessee, 501 U.S. 808 (1991); see also Babour v. State, 673 So. 2d 461 (Ala. Crim App. 1994), aff'd, 673 So. 2d 473 (Ala. 1995) (holding that opinions of the victim's family on the appropriate punishment may not be considered in capital sentencing proceedings); Ex parte Williams, 640 So. 2d 1015 (Ala. 1995) (holding that the court may not consider victim's family's views on the defendant, the crime or the appropriate punishment.) As such, prosecution's comments were prejudicial.

156. Counsel failed to object to the State's numerous misstatements of the law when addressing the jury. It is a cornerstone of the United States judicial process that the State "must not misstate the law when addressing the jury." Davis v. State, 494 So. 2d 851, 855 (Ala. Crim. App. 1986). Here, the State violated this principle but Counsel failed to object.

157. For example, the State erroneously told the jury that they could consider the "particularly violent nature of these murders" as going to the aggravating circumstances of the homicides. (R. at 3298.) This comment was highly improper because the heinous, atrocious or cruel aggravating circumstance, which is a statutory aggravating factor (Ala. Code § 13A-5-49(8) (1994)), was not charged in the indictment. In a capital case, the aggravating circumstances that the State intends to use must be alleged in the indictment in

order to give the accused notice. See Windsor v. State, 683 So. 2d 1027, 1038 (Ala. Crim. App. 1994) (citing Beck v. State, 396 So. 2d 645, 663 (Ala. 1980)). Therefore, Mr. Maples did not have notice, as required under Alabama law, that such aggravating factor was applicable to his case.

158. The State also misstated the law on mitigating factors in its closing arguments. Counsel asserted as a mitigating factor that Mr. Maples suffered "from a diagnosed mental personality disorder" that caused him to "snap and murder." (R. at 3086-87.) Under Alabama law, committing a capital offense "while the defendant [is] under the influence of extreme mental or emotional disturbance" constitutes a mitigating factor. Ala. Code § 13A-5-51(2) (1994). The prosecutor rebutted this allegation of a mitigating circumstance by alleging that in this case there was "no plea of *not guilty* by reason of insanity" and that Mr. Maples "[said] he didn't do it [the murders]," (emphasis added) (R. at 3290.) Such assertion was neither proper nor correct under the law. Indeed, it is established that the court and jury should consider "as a mitigating factor, *any aspect* of a defendant's character or record and *any of the circumstances* of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). On the other hand, the affirmative defense of insanity is strictly defined under Alabama law as the inability for the defendant, as a result of severe mental disease or defect, to appreciate the nature and quality or wrongfulness of his acts. See Ala. Code § 13A-3-1(a) (1994). Therefore, the standards required to establish an affirmative defense of insanity are not applicable to the allegation by Counsel of the mitigating factor of

extreme mental or emotional disturbance. Such comment of the State was both incorrect and confusing to the jurors' minds.

159. The prosecutor further stated that Mr. Maples's age was not a mitigating factor and stated that if Mr. Maples had been fourteen at the time of the offense, then his age would be a mitigating factor in this case. "If he was fourteen, I would be . . . telling you . . . that this is a mitigating circumstance because that would be." (R. at 3254.) However, under Alabama law, "the age of the defendant at the time of the crime" constitutes a mitigating circumstance. Ala. Code § 13A-5-51(7) (1994). It is further established that the court and jury should consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604. Thus, the age of fourteen is neither a recognized standard, nor relevant to the establishment of a mitigating factor. Such comment of the State was both incorrect and confusing to the jury's mind.

160. The prosecutor, to rebut the defense's presentation of mitigating factors other than the lack of prior criminal history, stated that such mitigating circumstance did exist in this case only because it relied on true facts: "the statutory mitigating factor [the lack of criminal history] . . . that we admit *because it is the truth.*" (R. at 3253.) The prosecutor thus implied that Counsel would not be truthful in their presentation of other mitigating factors, and that the jury should not trust them. This comment of the prosecution was improper and disrespectful of Counsel. It is established that the function of counsel is almost

as important as that of the judge, therefore, counsel is entitled to courtesy and respect. See Zebouni v. United States, 226 F.2d 826, 827 (5th Cir. 1955). Thus, to discredit Counsel in front of the jury is improper, and it has been recognized that subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial. See United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987). Thus, Counsel should have objected to this improper prosecutorial comment.

161. The State further misrepresented the law on aggravating and mitigating factors, when the prosecutor argued that *mitigating* circumstances would never outweigh *aggravating* circumstances. (R. at 3255.) However, Alabama law states the exact opposite test, that "the trial court shall determine whether the *aggravating* circumstances it finds to exist outweigh the *mitigation* circumstances it finds to exist." Ala. Code § 13A-5-47(e) (1994) (emphasis added); see, e.g., Ex parte Stewart, 659 So. 2d 122, 125 (Ala. 1993). Thus, the State argued a standard directly in conflict with the established law of Alabama, unconstitutionally placing the burden on Mr. Maples's to establish that his mitigating factors outweigh the aggravating factors. Counsel should have objected to this misrepresentation by the State that, upon information and belief, may have confused several jurors.

162. The prosecutor also improperly told the jury that, "[y]ou all said you were in favor of the death penalty" and that "[i]f you hadn't said that, you wouldn't be on the jury." (R. at 3306.) However, the law states that favoring a sentence of death is not a

prerequisite for sitting on a jury. See e.g., Witherspoon v. Illinois, 392 U.S. 510, 519 (1968) (holding that "[a] man who opposes the death penalty . . . can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror."); see also Wisenhant v. State, 555 So. 2d 235 (Ala. 1989). Counsel failed to object to this misrepresentation by the prosecutor.

163. Counsel failed to object to the State's accusations that Mr. Maples was a liar. (R. at 3288, 3292.) The State argued that Mr. Maples lied to his psychologist and thus implied that the jury should disregard all the psychologist's testimony. It is established that "arguments which lack support in the evidence, or seek to play upon the jury's undifferentiated fear or hatred of violence, are impermissible, as they encourage arbitrariness in the imposition of sanctions and preclude the individualized judgment required by the Constitution." Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978) (holding that prosecutor's repeated unsupported references to the defendant as a liar and drug dealer was impermissible); see also Crosslin v. State, 489 So. 2d 680, 684 (Ala. Crim. App. 1986) (holding that "[t]he practice of assuming in questions of fact not proven is, not only improper and unfair, but . . . must result in reversal of the case.") (citations omitted). Thus, the prosecutor's comments were improper and only served to inflame the passions and the prejudices of the jury. Nevertheless, Counsel failed to object.

164. Counsel were ineffective for failing to object to the State's improper comments on Mr. Maples's decision not to testify. In closing arguments at the

penalty phase, the State impermissibly commented on that fact when the prosecutor repeatedly told the jury that Mr. Maples never said a word about being sorry for the murders. (R. at 3286-88.) The State further argued, in response to Mr. Maples's claim that he was haunted by images of the murders, that it "sounds good but there has not been any evidence to support that; not one bit." (R. at 3287-88.) The prosecutor may not in any way comment on a defendant's failure to testify at trial. See Griffin v. California, 380 U.S. 609, 615 (1965) (holding the "Fifth Amendment prohibits comment on the defendant's silence); Ex parte Wilson, 571 So. 2d 1251, 1261 (Ala. 1990) (citing Ala. Code § 12-21-220 (1994) stating that a defendant's failure to be a competent witness for himself "shall not . . . be subject to comment by counsel.") According to the appellate courts in Alabama, a statement that a particular aspect of the State's case is undisputed or that the defense offered no evidence on a particular issue will be deemed a comment on the defendant's failure to testify when "the only person the jury could have expected to rebut the State's evidence" on the challenged point "was the defendant." Ex parte Williams, 461 So. 2d 852, 854 (Ala. 1984). Thus, although the State's arguments on Mr. Maples's silence violated his Fifth Amendment right not to testify, Counsel failed to object to any of these comments.

165. Similarly, Counsel were ineffective for failing to object to the State's improper comments on Mr. Maples's flat affect and courtroom demeanor. (R. at 3295.) It is established that the State cannot comment on a defendant's appearance and court demeanor. See Chamberlain v. State, 247 So. 2d 683, 684 (Ala. Crim. App. 1971). In addition, the State's comments on the

demeanor and appearance of the accused have been ruled as highly improper. See Hughes v. State, 437 A. 2d 559 (Del. 1981). Thus, Counsel should have objected to comments as improper and prejudicial to Mr. Maples.

166. Individually and cumulatively, Counsel's failure to object to the numerous instances of prosecutorial misconduct described above prejudiced Mr. Maples and indicate that Counsel "[were] not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Here, "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. In addition to the repeated instances of Counsel's ineffectiveness prejudicing Mr. Maples at trial, Counsel's failure to object to each of these improper comments or instances of prosecutorial misconduct severely prejudiced Mr. Maples on appeal. Indeed, had Counsel objected to the State's improper comments at trial, the issues of prosecutorial misconduct would have been reviewed by the appellate court under more deferential standards and would have resulted in a reversal on appeal. See Ex parte Thomas, 766 So. 2d. 975, 979 (Ala. 2000). These failures of Counsel denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Alabama law. This Court must now reverse Mr. Maples's conviction and sentence of death.

J. [Withdrawn]

167. [Paragraph intentionally omitted.]

K. Counsel Failed to Recognize or Adequately Object to Trial Error During the Sentencing Phase.

168. Counsels' repeated failure to recognize and adequately object to trial error prejudiced Mr. Maples at trial, as well as on appeal where the appellate court repeatedly noted that, "[w]hile [counsel's] failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice." Maples, 758 So. 2d at 16. Thus, Counsel's failure to object to what might otherwise have been reversible errors caused the appellate court to review them under the far more stringent "plain error" standard. See Maples, 758 So. 2d at 21.

169. Counsel failed to object to the court impermissibly instructing the jury to find that an aggravating circumstance existed in Mr. Maples's case. During the penalty phase, the court announced that it was going to instruct the jury that an aggravating circumstance was found to exist and later reiterated its plan. (R. at 3064.) Mr. Maples properly objected that such an instruction from the court was an impermissible comment on the evidence, but was overruled. (R. at 3231-32.) Despite acknowledging its impropriety, the court instructed the jury that they "ha[d] already found the State ha[d] satisfied its burden of proof beyond a reasonable doubt as to the aggravating circumstances at issue *in this phase* of the trial." (R. at 3231.) In capital trials, the jury is called upon to make two sets of fact-finding decisions; first, whether the defendant is guilty of capital murder beyond a reasonable doubt, and second, whether aggravating circumstances exist and, if so, whether they outweigh mitigating circumstances. The court's

instruction clearly invaded the province of the jury, and rendered Mr. Maples's sentence of death unreliable, in that the State was thus relieved of its burden of proof. See Re Winship, 397 U.S. 358 (1970); Sandstrom v. Montana, 442 U.S. 510 (1979). Counsel's failure to object to the court's instruction created the reasonable probability that had they objected the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

170. Counsel failed to object to the court improperly sentencing Mr. Maples to death after rejecting evidence of three statutory mitigating circumstances. Counsel introduced evidence to support the mitigating circumstance 1) that the capital offense was committed while Mr. Maples was under the influence of extreme mental or emotional disturbance, (Ala. Code § 13A-5-51(2) (1994)); 2) that the capacity of Mr. Maples to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, (Ala. Code § 13A-5-51(6) (1994)) and; 3) that Mr. Maples's age at the time of the offense constituted a mitigating circumstance, (Ala. Code § 13A-5-71(7) (1994)). The court rejected each of these mitigating circumstances. (Sentencing Order at 7-9.) Consideration of these mitigating circumstances—when applicable—is mandatory. See Ala Code § 13A-5-51 ("Mitigating circumstances *shall* include . . .") (emphasis added). Counsel's failure to object to the court's rejection of these statutory mitigating circumstances created the reasonable probability that had they objected, the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694.

III. OVERALL PERFORMANCE OF COUNSEL.

A. Counsel Were Ineffective for Using Contradictory Strategies in the Guilt and the Penalty Phases of the Trial.

171. Counsel were ineffective for using different and contradictory strategies about Mr. Maples's intoxication during the guilt and penalty phases of Mr. Maples's trial. Presenting affirmative evidence that is internally inconsistent renders Counsel's performance ineffective. See Waters v. Thomas, 46 F.3d 1506, 1530 (11th Cir. 1995) (Tjoflat, J. dissenting) ("Because the guilt phase and penalty trials are integrally related, devising one strategy for the guilt phase and a separate one for the penalty phase is also insufficient. In order to be effective, a capital defense attorney must develop a consistent theory to be used at the guilt and penalty phases.") (quoting Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 356 (1993)); Sobel v. State, 564 So. 2d 1110 (Fla. Dist. Ct. App. 1990) (holding that counsel was ineffective when he called witnesses who gave testimony adverse to the insanity defense he had asserted). Conflicting evidence also confuses the jurors and causes them to distrust all evidence presented by Counsel, thus undermining Mr. Maples's credibility. See generally, White, supra.

172. During the guilt phase of the trial, the State introduced substantial evidence proving that Mr. Maples was intoxicated by the time he went to a pool hall shortly before the shootings. (See Paragraph 19.)

173. The State also introduced evidence that Mr. Maples used crack and crystal methamphetamine on the night of the shootings. (See Paragraph 20.)

174. In stark contrast, during the guilt phase Counsel attempted to establish through cross-examination that Mr. Maples was neither intoxicated nor under the influence of drugs at the time of the shootings. Counsel also called several witnesses in a misguided attempt to show that Mr. Maples was not intoxicated prior to the shootings. Inexplicably, while summarizing the cross-examination and direct examination testimony during his closing argument, Counsel inaccurately told the jury that "[t]here is no evidence that he consumed drugs that night." (R. at 2920.)

175. However, during the penalty phase, Counsel employed a strategy directly contradictory to his guilt phase strategy. In Counsel's opening statement at the penalty phase, Counsel expressly contradicted their argument in the guilt phase and substantially undercut their own credibility, as well as Mr. Maples's credibility, by stating that "there was at least evidence of at least alcohol usage on this occasion . . . but there was also drug usage." (R. at 3085.) Counsel further stated that Mr. Maples was so intoxicated and under the influence of drugs at the time of the offense that "but for the alcohol and for the drug usage on this occasion, this would probably not have happened. That is a mitigating factor." (R. 3085-86.) Counsel then introduced evidence of Mr. Maples's alcohol and drug usage to support at least two mitigating factors: (1) that the shootings occurred while Mr. Maples was under the influence of extreme mental or emotional disturbance due to his use of drugs and alcohol prior to the shootings (Ala. Code § 13A-5-51(2) (1994)) and (2) that the capacity of Mr. Maples to appreciate the criminality of his conduct or to conform his conduct to

the requirements of law was substantially impaired by drug and alcohol use (Ala. Code § 13A-5-51(6) (1994)).

176. Dr. Allen Shealy, a psychologist, testified that Mr. Maples was drinking steadily for a period of approximately ten hours just prior to the shootings, in addition to smoking at least some marijuana during this time (a marijuana joint and 2/5th of whisky and some beer before 5 p.m., 7-8 additional beers by 7:30 p.m., then funneling (quickly drinking) at least 2 more beers prior to meeting friends at a bar where he drank 7-8 White Russian mixed drinks, (R. at 3109-24)). This pattern of alcohol and marijuana abuse served as a trigger that, along with an internal stimulus due to emotional instability, contributed to a state of extreme mental or emotional disturbance. (R. at 3168.) It also impaired Mr. Maples "in terms of his capacity to behave in a normal fashion or to conform his behavior to the requirements of the law." (R. at 3155.) Thus, Counsel provided evidence at the penalty phase of the trial in order to support two of Mr. Maples's mitigating factors that directly contradicted evidence they presented at the guilt phase.

177. As instructed by the trial judge during the penalty phase, the jury can consider evidence introduced by either party during both the guilt phase and the penalty phase. (R. at 3318-19.) Counsel's conduct in presenting contradictory evidence severely damaged Mr. Maples's case by undermining his credibility and confusing the jurors, thus strengthening the State's case and leaving the jury little alternative but to sentence Mr. Maples to death. "Such conduct . . . brings into question the fundamental fairness of the trial and shows a collapse of the adversarial process." Ex parte Womack, 541 So. 2d 47, 68 (Ala. 1988);

Freeman v. Class, 95 F.3d 639, 642-43 (8th Cir. 1996) (holding that counsel was ineffective under Strickland when counsel introduced into evidence documents that directly inculpated the defendant).

178. This error of contradictory strategies fell far below the standard of reasonable performance and demonstrated such a failure to know or understand the law that it cannot be considered permissible trial strategy. Counsel even admitted at the beginning of the penalty phase that they lacked knowledge of the law with respect to how to conduct an effective penalty phase defense, telling the court, "I don't know...I'm unfamiliar with this process." (R. at 3064.) However, lack of knowledge of the law cannot be considered a trial strategy. See Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). Here, Counsel's deficient performance prejudiced the jury against Mr. Maples, resulting in a conviction of death that the jury would not otherwise have returned. See Strickland v. Washington, 466 U.S. 668 (1984).

IV. NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED MR. MAPLES A FUNDAMENTALLY FAIR TRIAL.

179. Here, the State engaged in numerous instances of prosecutorial misconduct during both phases of the trial. In so doing, the State violated its "duty to refrain from improper methods calculated to produce a wrongful conviction." Davis v. State, 494 So. 2d 851, 853 (Ala. Crim. App. 1986) (citing Berger v. United States, 295 U.S. 78, 88 (1935). These repeated violations denied Mr. Maples his rights under the Fifth, Sixth, Eighth and Fourteenth Amendment to the

United States Constitution, under the Alabama Constitution and under Alabama law.

180. Notably, the State engaged in prosecutorial misconduct when, among other things, the prosecutor improperly introduced at trial gruesome pictures, improperly examined witnesses, made highly inflammatory and prejudicial closing arguments, both at the guilt and the penalty phase, consisting of, but not limited to, statements about what the truth was in this case, statements about the message the jury ought to send to the society through a verdict of guilty, repeated reading of the indictment, statements of personal beliefs and convictions by the prosecutor, implications about what the jury ought to think, improper invocation of the social value of Mr. Maples's death, improper invocation of the victim's family's views on the case, numerous misstatements of the law, repeated accusations that Mr. Maples lied and improper comments on Mr. Maples's courtroom demeanor and decision not to testify. See Paragraphs 95 to 102.

181. Additionally, the State improperly relied on a statutory aggravating factor during closing arguments of the guilt phase, when the prosecutor referred to the "execution style" murder of Mr. Robinson without, at the same time, providing Counsel notice of the corresponding aggravating factor in the indictment. (See Paragraph 94.) Not only was there no evidence in support of such argument, but this implication of an aggravating factor without notice violated Alabama statutes on the use and allegation of aggravating factors in capital cases. As such, the State's improper closing argument only served to inflame the jury

against Mr. Maples and prejudiced Mr. Maples's right to be tried by a fair and independent jury.

V. THE EVIDENCE OF CAPITAL MURDER DURING A ROBBERY WAS INSUFFICIENT TO SUSTAIN A CAPITAL MURDER CONVICTION AND SENTENCE OF DEATH AS A MATTER OF LAW.

182. It is axiomatic that the State has the burden of proving each element of the charged crime beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). This burden requires that the State convince the jury that Mr. Maples was guilty beyond a reasonable doubt of each charged element of the offense; and on appeal, the evidence must be sufficiently strong to overcome any "reasonable hypothesis" of Mr. Maples's innocence of the crime, as is required in circumstantial cases. Ex parte Brown, 499 So. 2d 787, 789 (Ala. 1986); Ex parte Mauricio, 523 So. 2d 87 (Ala. 1987). In Mr. Maples's case, the State failed to meet this heavy burden.

183. The State sought and obtained a conviction on the second count of the indictment, murder during the course of a robbery. See Ala. Code § 13A-5-40(a)(2) (1994). However, the State failed to introduce sufficient evidence to support a conviction on that count. See Paragraphs 30 to 31.

184. This is insufficient evidence to support a capital murder conviction. The onus rests with the State to meet its constitutional obligation of proving each element beyond a reasonable doubt, to the exclusion of every other reasonable hypothesis. See Ex parte Brown, 499 So. 2d 787 (Ala. 1986). The State's failure to meet this obligation violated Mr. Maples's rights under the Alabama Constitution and

under Alabama law, and requires that this court now reverse Mr. Maples's conviction and death sentence as a matter of law. See Jackson v. Virginia, 443 U.S. 307 (1979).

VI. IRRELEVANT AND PREJUDICIAL EVIDENCE WAS INTRODUCED AT TRIAL THAT DENIED MR. MAPLES A FAIR TRIAL AND A FAIR PENALTY DETERMINATION.

185. It is axiomatic that only relevant, probative evidence is properly admissible at trial. See Ala. R. Evid. 402; Old Chief v. United States, 519 U.S. 172 (1997). During the guilt phase of Mr. Maples's trial, the State introduced testimony about events that happened after the shootings. See Paragraphs 32 to 35. All of this testimony should have been excluded from the trial because of its devastating prejudicial impact when compared to its minimal probative value to the prosecution. This was prejudicial and denied Mr. Maples a fair trial and an accurate penalty phase determination. Such testimony was thus inadmissible and denied Mr. Maples his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, under the Alabama Constitution and under Alabama law.

VII. JURY ISSUES

A. The Court Failed to Remove for Cause Venire Members Who Could Not Be Impartial and Thus Deprived Mr. Maples of a Fair Trial by an Impartial Jury.

186. At *voir dire*, some of the venire members made it clear they were fully committed to the death penalty and would automatically impose a death sentence upon showing of guilt:

a. Laura Sivley, (R. at 843-46, 882-83),

b. Dutch Wilbanks, (R. at 1088-89, 1093-94, 1099) and

c. Jimmy Quattlebaum, (R. at 849-51).

187. Counsel requested that each of these venire members be struck for cause on the grounds of the aforementioned statements. However, the court refused to excuse each of these venire members.

188. It was error for the court to refuse to remove these venire members for cause and to overrule Counsel's objections to venire members who could not properly consider this case. Therefore, Mr. Maples was deprived of the opportunity to select a fair and impartial jury, thus violating his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as under Article I, Sections 1, 6 and 15 of the Alabama Constitution and under Alabama Codes Sections 12-16-55 and 12-16-56.

B. Mr. Maples Was Deprived of His Right to a Jury Trial by Fair and Impartial Jurors Because Sworn Venire Members (Including Deliberating Jurors) Failed to Disclose Material Information.

189. Mr. Maples was deprived of the opportunity to select a fair and impartial jury because, during *voir dire*, some of the venire members gave false or materially misleading information, failed to truthfully answer questions put to them or failed to reveal material information asked of them.

190. It has been long recognized that "[p]arties have a right to have questions answered truthfully by prospective jurors to enable them to exercise their discretion wisely in exercising their peremptory strikes." Ex parte O'Leary, 438 So. 2d 1372, 1373 (Ala.

1983) (granting a new trial where a juror did not disclose that she knew anyone who had been sexually abused and evidence was presented at a hearing that the juror did, in fact, know someone who had been sexually abused); State v. Gilbert, 568 So. 2d 876, 878 (Ala. Crim. App. 1990) (granting defendant a new trial after hearing uncovered evidence that a juror failed to correctly answer questions posed during voir dire); Abercrombie v. State, 574 So. 2d 879 (Ala. Crim. App. 1990) (reversing conviction where juror did not disclose that she had an interest in the conviction of the defendant, thereby showing probable prejudice); Clark v. State, 551 So. 2d 1091 (Ala. 1991) (holding that where a juror failed to disclose that he had served on a previous case, reversible error occurs).

191. Despite direct and unambiguous questions from Counsel, one or more jurors failed to disclose that they were strongly committed to the automatic imposition of the death penalty if Mr. Maples was found guilty of capital murder. One juror also failed to disclose that he had served as a juror on a previous civil case, despite a question from the trial judge as to whether any of the panel members had previously served in a trial. The failure of these jurors to truthfully answer questions at *voir dire* denied Mr. Maples his right to a fairly selected jury. Indeed, absent effective disclosure by jurors of all relevant information during the course of their selection, Mr. Maples had no other way of obtaining this information, which was learned among other things from recent interviews with jurors.

191A. Claims of juror misconduct are cognizable as constitutional violations under Rule 32.1(a). Ex Parte Pierce, 1981270 2000 Ala. LEXIS 376 (Sept. 1, 2000);

Ex Parte Dobyne, 1992261, 2001 Ala. LEXIS 214 (June 15, 2001). In Pierce, the Court specifically stated that a claim of juror misconduct under Rule 32.1(a) is not procedurally barred and must be considered by the Court where the petitioner proves at the Rule 32 evidentiary hearing, by a preponderance of the evidence, that the information as to the juror misconduct was not known and could not reasonably have been discovered at the time of the trial and direct appeal. Ex Parte Pierce, 1981270 2000 Ala. LEXIS 376, at *30. As set forth above, and as Mr. Maples will prove at the evidentiary hearing, the information underlying the claims of juror misconduct was not known and could not reasonably have been discovered at the time of the trial and direct appeal. Accordingly, these jury claims must be decided by this Court on the merits after the evidentiary hearing where Mr. Maples intends to prove all of the other claims asserted here.

192. Under Alabama law, the test in determining whether a new trial should be granted because of juror misconduct is whether the defendant "*might* have been prejudiced, not whether he *actually* was prejudiced, by such misconduct" (Ex parte Dobyne, 1992261, 2001 Ala. LEXIS 214, at *17 (June 15, 2001) (emphasis added), quoting Roan v. State, 225 Ala. 428, 435 (1932)), and this determination is made by the trial court's discretion on the basis of the various facts alleged by the petitioner. Ex parte Dobyne, 1992261, 2001 Ala. LEXIS 214, at *21 (June 15, 2001). In this case, the failure of certain prospective jurors to truthfully disclose critical material information was highly prejudicial to Mr. Maples. Therefore, Mr. Maples was deprived of the opportunity to select a fair and impartial jury, thus violating his rights under the

Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as under Article I, Sections 1, 6 and 15 of the Alabama Constitution and under Alabama Codes Sections 12-16-55 and 12-16-56.

C. Mr. Maples Was Deprived of His Right to a Trial by Fair and Impartial Jurors Because the Jury Verdict Was Tainted by Improper Jury Communications.

193. Prior to commencement of deliberations, two or more sworn jurors may have discussed the facts of the case outside the courtroom. Upon information learned from interviews with jurors, at least one of these conversations, between Mr. Legg, the foreperson, and another juror while they were at the hotel where the jury was sequestrated, was noticed by several jurors and the bailiff, who reportedly stopped the conversation but unlawfully failed to report such event to the judge. Indeed, at the end of the trial, the judge stated, in connection with the jury: "According to my bailiffs, there have been zero problems and that is not often the case with a sequestrated jury." (R. at 3351.) As a result of these discussions outside of the deliberations, Mr. Maples was deprived of his right to a fair and impartial trial by jury. This conduct, which violated the court's express instructions, was simply impermissible and, Mr. Maples will prove at the evidentiary hearing that he was either actually prejudiced or at least "*might* have been prejudiced [...] by such misconduct" (Ex parte Dobyne, 2001 Ala. LEXIS 214, at *17 (emphasis added), as a result of which a new trial should be granted on the grounds of juror misconduct.

194. [Paragraph intentionally omitted.]

195. In addition, upon information and belief based on interviews with jurors, the entire jury may have been exposed to facts not in evidence. During the deliberations, at least one juror, Mr. Beard, related his own personal belief and experiences, referring to his own children as an example, in order to convince the other jurors to sentence Mr. Maples to death. These experiences were extraneous to the evidence in the case and thus were inappropriate to interject into the deliberations. Under Alabama law, any extraneous evidence that *might* have influenced a juror nullifies the verdict. See Ex parte Troha, 462 So. 2d 953 (Ala. 1984). Accordingly, Mr. Maples was denied his right to confront the evidence against him, in violation of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as under the Alabama Constitution and under Alabama law, and the verdict should be nullified.

D. **Mr. Maples Was Deprived of His Right to a Trial by Fair and Impartial Jurors Because One Juror Knew Personally a Witness and the Court Failed to Excuse this Witness When the Juror Revealed That She Knew the Witness Personally.**

195A. Upon information and belief based on recent interviews with jurors, Ms. Selby knew personally Darrell Jones, the paramedic who picked up Mr. Robinson's body. The name of Mr. Jones had not been mentioned during voir dire, therefore the juror was given no chance to know that Mr. Jones would testify and to reveal to the Court that Mr. Jones was a very close friend. When Mr. Jones came to the stand to testify, Ms. Selby reportedly informed the Court that

she knew Mr. Jones. The Court determined that the friendship did not constitute a problem and that the witness should proceed with his testimony.

195B. This decision, and the prejudice that resulted therefrom, deprived Mr. Maples of his right to a trial by fair and impartial jurors.

VII. MR. MAPLES'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE GIVEN INVOLUNTARILY AND UNDER COERSION, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND ALABAMA LAW.

196. The threshold for admissibility of any criminal defendant's statement is voluntariness. See Rhode Island v. Innis, 446 U.S. 291 (1980). Extrajudicial confessions are *prima facie* inadmissible because they are presumed to be involuntary. See Ex parte Williams, 627 So. 2d 999, 1002-03 (Ala. 1994). Before an accused's statement may be admitted, the State has to overcome the presumption of involuntariness by proving a Miranda predicate and voluntariness. See Ex parte Pardue, 661 So. 2d 268, 269-70 (Ala. 1994) (reversing conviction for first degree murder because the confession was deemed involuntary even after Miranda warnings were given). Courts must use a "totality of the circumstances" analysis in determining whether a statement was given voluntarily, and the court must "indulge in every reasonable presumption against waiver." Ex parte Johnson, 522 So. 2d 234, 236 (Ala. 1988) (quoting Tinsley v. Purvis, 731 F.2d 791, 794 (11th Cir. 1984) citing Brewer v. Williams, 430 U.S. 387 (1977).

197. Under the totality of the circumstances, Mr. Maples's statements to the police were not voluntary. A confession cannot be voluntary if "the defendant is so intoxicated by alcohol or other drugs that the confession is not rationally and freely given." United States v. Kreczmer, 636 F.2d 108, 110 (5th Cir. 1981) (citing United States v. Taylor, 508 F.2d 761 (5th Cir. 1975)). Mr. Maples had been smoking marijuana and drinking heavily during the evening and night of his arrest, until less than 30 minutes before his arrest at 10:30 p.m. Detective Tim Mason, the arresting officer, admitted that he could not "recall" if he asked Mr. Maples whether or not he was on drugs, (R. at 432), and testified that, while waiting for the Decatur police to arrive in Nashville, Mr. Maples slept in his chair, (R. at 433). Mr. Maples was under the influence of drugs and alcohol and the statements made to Detective Mason were involuntary and should have been suppressed. In addition, soon after Mr. Maples's arrest, Decatur police extracted more incriminating statements from Mr. Maples during a videotaped statement that began at 3:20 a.m., and continued uninterrupted for nearly three hours. At that time, Mr. Maples's faculties were still weakened by drugs, alcohol and exhaustion, so he could not have made a "knowing and intelligent relinquishment or abandonment" of his Miranda rights. Tomlin v. State, 601 So. 2d 120, 122 (Ala. Crim. App. 1989), rev'd on other grounds, 601 So. 2d 124 (Ala. 1991). Consequently, the trial judge reversibly erred in admitting the statements.

198. Moreover, the police coerced Mr. Maples into confessing. Before admitting a confession, a court must determine that the defendant's "will was not overborne

by the pressures and circumstances swirling around him." Jackson v. State, 562 So. 2d 1373, 1380 (Ala. Crim. App. 1990). In addition to subjecting Mr. Maples to coercive and intimidating circumstances in the middle of the night, Officer Battles implied that Mr. Maples would be physically abused if he did not confess. Fearful of this abuse, Mr. Maples was obliged to tell the officers what they wanted to hear. Statements made by Mr. Maples under these circumstances should not have been admitted by the court. See Beecher v. Alabama, 389 U.S. 35 (1967) (reversing conviction of defendant who confessed after he was ordered at gun point to speak his guilt and again while in pain and under the influence of drugs); Ex parte Matthews, 601 So. 2d 52 (Ala. 1992) (finding that a police officer's statement to the defendant that he would tell the district attorney whether or not the defendant cooperated with him was coercive).

IX. THE VERDICT FORM IMPROPERLY LIMITED THE FREEDOM OF THE JURY TO ACQUIT MR. MAPLES OF A LESSER INCLUDED OFFENSE.

199. For the capital murder count of killing two or more persons pursuant to one course of conduct (Count One) and for the capital murder count of killing Mr. Terry during a robbery in the first degree (Count Two), the court submitted both **guilty** and **not guilty** verdict forms to the jury. (R. at 3015-16.) However, for the two lesser included offenses subsumed in Count One—the intentional murder of Mr. Robinson and the intentional murder of Mr. Terry—the court submitted only **guilty** verdict forms. (R. at 3017.) The court also provided the jury with only **guilty** verdict forms for the two lesser included offenses subsumed in Count

Two: the intentional murder of Mr. Terry and theft in the first degree. (R. at 3018.) The court instructed the jury to use the not guilty verdict forms provided for the capital counts if the jury intended to return a not guilty verdict with respect to the lesser included offenses of the capital counts. (R. at 3017.)

200. By not providing the jury with individual not guilty verdict forms for the lesser included offenses, the court made it impossible for the jury to return a verdict of not guilty with respect to one lesser included offense but not the other. For example, with respect to Count Two, the jury could not find Mr. Maples guilty of intentional murder but not guilty of first degree theft. Instead, Mr. Maples could only be found guilty of the capital count, guilty of intentional murder AND first degree theft or not guilty with respect to all counts charged. Therefore, the verdict forms were deficient and prejudicial to Mr. Maples. See Beck v. Alabama, 447 U.S. 625 (1980) (striking down Alabama law that forced the jury either to convict the defendant of the capital crime or to acquit him of all charges and allow him to go free).

201. In addition, the absence of separate not guilty verdict forms for the lesser included offenses gave the impression that the jury was precluded from returning a not guilty verdict as to the lesser included offenses. Alabama law, on the other hand, mandates that the determination of guilt or innocence is the hallowed function of the jury and may not be taken away from them. See Roberts v. State, 59 So. 2d 821 (Ala. Crim. App. 1952). Due to the improper verdict forms and the confusing jury instructions, Mr. Maples's conviction must be reversed.

202. Counsel admitted their lack of experience in drafting verdict forms. "I don't have enough experience to know how this is handled, Judge." (R. at 2944). However, a failure to know or understand the law cannot be accorded deference as a reasonable trial strategy, therefore Counsel rendered ineffective assistance. See Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991); People v. Carter, 354 N.E.2d 482, 485 (III. App. Ct. 1976) (citing United States v. Bella, 353 F.2d 718, 719 (7th Cir. 1965)).

X. ALABAMA'S MANNER OF EXECUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

203. The Eighth Amendment requires States to take all feasible measures to minimize the risk of cruelty in administering capital punishment. See Zant v. Stephens, 462 U.S. 862 (1983). Justice Powell noted that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives." Furman v. Georgia, 408 U.S. 238, 430 (1972); Eddings v. Oklahoma, 455 U.S. 104 (1982) (O'Connor, J. concurring).

204. Accordingly, the United States Supreme Court has looked to legislation enacted by the country's legislatures as "[t]he clearest and most reliable objective evidence of the Contemporary values. . . ." Penry v. Lynaugh, 492 U.S. 302, 331 (1989). Twenty-six states at one time authorized execution by judicial electrocution. Of the twenty-six, only *two -- Alabama and Nebraska* – still enforce electrocution as their sole method of execution. No state has introduced judicial execution by electrocution as a new method of execution since 1949. No jurisdiction outside the

United States uses judicial electrocution to administer capital punishment. Accordingly, Alabama's present use of judicial electrocution is inconsistent with society's evolving standards of decency.

205. Electrocutions in Alabama are qualitatively more cruel and unusual than a civilized society should tolerate. The State will utilize faulty equipment, unqualified personnel and inadequate procedures in executing Mr. Maples which will result in body charring and electrical burns to his back, thighs, arms and abdomen. In 1990, the Commissioner of the Alabama Department of Corrections conceded that the State's electrocution equipment was antiquated, that the parts were old, out of stock and irreplaceable, and that as a result the State planned to replace the electric chair. Yet eleven years later, the very same equipment continues to carry out Alabama's executions. Design flaws and the use of inadequately trained personnel result in tortuous and mutilating executions which do not comport with Eighth Amendment standards. See Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) (holding that analysis of whether a method of execution violates the Eighth Amendment must begin with "objective evidence of pain"; finding gas chamber to be unconstitutional.)

206. This Court must reverse Mr. Maples's death sentence because his execution would constitute cruel and unusual punishment in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law.

XI. THE CUMULATIVE EFFECT OF ALL OF THE ABOVE LISTED ERRORS ENTITLES MR. MAPLES TO A NEW TRIAL.

207. The cumulative effect of the errors of State and Federal law discussed above violated Mr. Maples's rights to a fair trial protected by the Fourth, Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law. See Kyles v. Whitley, 514 U.S. 419 (1995) (holding that the cumulative effect of violations must be considered by court); Daniel v. Thigpen, 742 F. Supp. 1535 (M.D. Ala. 1990) (finding that the cumulative effect of Counsel's errors resulted in defendant being deprived of his right to effective assistance of counsel); Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (holding that in limited situations relief may be granted for cumulative errors at trial where individual errors involved matters of constitutional dimension and errors infected the trial and violated due process), cert. denied, 508 U.S. 960 (1993). For all the reasons cited above, we request that this Court grant a new trial and penalty hearing.

PRAYER FOR RELIEF

208. For all the above stated reasons and such other reasons as may be made upon amendment of this Petition and a full evidentiary hearing, Cory Maples respectfully asks this Honorable Court to grant him the following relief:

(a) allow Mr. Maples access to the law library so that he can assist counsel in preparing for an evidentiary hearing;

(b) conduct a full and fair evidentiary hearing, that is recorded and transcribed, at which proof may be offered concerning the allegations in this petition and any other allegations raised in amendments to this petition;

(c) provide Mr. Maples, who is indigent, with the opportunity to engage in discovery and with funds sufficient to investigate the facts relating to the issues set forth herein and present witnesses, experts and other evidence in support of the allegations contained in this petition;

(d) issue an order relieving Mr. Maples of his unconstitutionally obtained conviction and death sentence following a full and complete hearing; and

(e) grant Mr. Maples any such additional relief as is just, equitable, and proper under Federal and State law.

Respectfully submitted,

/s/ C. Ingen-Housz
JAASI MUNANKA
CLARA INGEN-HOUSZ

125 Broad Street
New York, NY 1004
212-558-3028

Counsel for Mr. Cory Maples

JOHN G. BUTLER, JR.
MacDaniel & MacDaniel
223 East Side Square
Huntsville, AL 35802

Local Counsel

Dated: December 7, 2001

ATTACHMENT A

Cory Maples's Prison Number: Z-624/4D13

Trial Attorneys:

Mark Craig	Craig & Craig 1408 Fifth Avenue Suite 3 Decatur, AL 35601
Phil Mitchell	Edwards, Mitchell & Reeves 123 Lee Street, NE Suite A Decatur, AL 35601

Direct Appeal Attorneys:

Clint Brown Jr.	118 E. Moulton Street Decatur, AL 35601
James R. Mason	P.O. Box 1458 Decatur, AL 35602
Denise Hill	116 Lee Street, NE Decatur, AL 35601

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon opposing counsel, by mailing a copy of same at the following address: Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, AL 36130.

/s/ Clara Ingen-Housz
APPLICANT/AFFIANT

ATTORNEY'S VERIFICATION UNDER OATH SUBJECT TO PENALTY FOR PERJURY

I, Clara Ingen-Housz, swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on December 7, 2001.

/s/ Clara Ingen-Housz
Signature of Petitioner's Attorney

SWORN TO AND SUBSCRIBED before me this the 7th day of December, 2001.

/s/ Sean M. Davis
Notary Public
[Notary stamp omitted]

Name and address of attorney representing petitioner in this proceeding (if any):

Clara Ingen-Housz, 125 Broad Street, 34th Floor, New York, NY 10004
Jaasi Munanka, 125 Broad Street, 31st Floor, New York, NY 10004
John G. Butler, Jr., McDaniel & McDaniel, 223 East Side Square, Huntsville, AL 35801

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CORY R. MAPLES,	)	
	)	
Petitioner,	)	
	)	Case No. CC-95-842.60
v.	)	
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

ORDER

Having considered the post-conviction petition filed pursuant to Rule 32, *ARCrP*, on behalf of the petitioner, Cory R. Maples, and having considered the State of Alabama's Answer and Motion to Dismiss; this Court, having personal knowledge of the underlying proceedings, makes the following findings of facts and conclusions of law:

FACTS OF THE CRIME

As previously presented in this Court's sentencing order, the evidence and testimony presented at trial established that at some time in the late evening hours of Friday, July 7, 1995 or the early morning hours of Saturday, July 8, 1995, Stacy Alan Terry, Barry Dewayne Robinson, II, and the Petitioner, Cory Maples, arrived at the residence of the Petitioner on Mud Tavern Road in Morgan County, Alabama. All three young men were acquaintances. Terry, whose nickname was Twinky, and the Petitioner had spent the evening of July 7 drinking, playing pool, and riding around in Terry's 1995 Camaro. The Petitioner and

Terry had attended high school together until the Petitioner dropped out his senior year. As indicated by the testimony of family and friends, the two young men had spent a considerable amount of time together during the week preceding these events.

Robinson was new to the area, but had known Terry and the Petitioner for several months. Robinson asked Terry for a ride home from the pool hall where all three young men were playing pool.

Once the three young men arrived at the home of the Petitioner, the Petitioner left the car and went inside the mobile home. The Petitioner picked up a .22 caliber rifle and returned to the car where Terry and Robinson sat getting ready to leave. The Petitioner walked to the driver's side of the car and shot Terry twice in the head and then shot Robinson twice in the head.

At approximately 1:00 a.m. on July 8, 1995, the Petitioner's half-brother, Daniel Maples, and his friend, Matt Shell, arrived at the residence on Mud Tavern Road and found Terry's body lying in the driveway close to the trailer where the Petitioner and his half-brother lived with their father and the Petitioner's step-mother.

At approximately 9:00 p.m. on July 8, 1995, the Decatur police received a report of a body found in a creek commonly referred to as Mud Tavern Creek, one mile from the Petitioner's residence. The body was identified as that of Barry Robinson, II.

During the ensuing investigation, officers of the Morgan County Sheriff's Department obtained information that implicated the Petitioner in the killings of Terry and Robinson. The officers began to

look for the Petitioner and Terry's missing Camaro with the personalized tag bearing the word "TWINK".

In the late evening of August 1, 1995, the Nashville Metropolitan Police Department received a telephone call from an individual who had seen the Petitioner at the Best Rest Motel off I-10 in Nashville. The individual had seen a picture of the Petitioner and heard a description of the car from a local television station. Members of the Nashville Police Department apprehended the Petitioner at the motel. The Petitioner was transported to the Nashville Metro Police Department where he was held until members of the Morgan County Sheriff's Department arrived. During the early morning hours of August 2, 1995, the Petitioner gave Investigators Howard Battles and Byron Whitten of the Morgan County Sheriff's Office a videotaped statement confessing to the murders. The Petitioner's statement was admitted into evidence at trial. Additionally, the T-shirt that the Petitioner wore the night of the murders was recovered from his motel room in Nashville, Tennessee. DNA analysis indicated the T-shirt was stained with Robinson's blood.

Autopsies revealed that Terry and Robinson died as the result of being shot in the head. Both were shot twice in the head. The medical examiner determined that each man's death was instantaneous following the shots to the head. The wounds were consistent with an execution-type slaying. The evidence of Maples's guilt was overwhelming and proved beyond any reasonable doubt that the Petitioner shot both men. He was armed with a .22 caliber rifle belonging to his father.

PROCEDURALLY BARRED CLAIMS

"Rule 32 is not a substitute for a direct appeal." *Siebert v. State*, 778 So. 2d 842, 850 (Ala. Crim. App.

1999), cert. denied, 778 So. 2d 857 (Ala. 2000). "[T]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." *State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)." *Boyd v. State*, 746 So. 2d 364, 374 (Ala. Crim. App: 1999). Further, the Court of Criminal Appeals has held that a circuit court should not address the merits of post-conviction claims that are procedurally barred under Rule 32, *ARCrP*. *Sieber*, 778 So. 2d at 846. With these principles in mind, this Court holds as follows:

Claim IV, paragraphs 179-181 of the petition, is procedurally barred because the allegations either could have been but were not raised at trial, were raised or addressed on direct appeal or could have been but were not raised or addressed on direct appeal. Rules 32.2(a)(3), 32.2(a)(4), and (5), *ARCrP*; *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. 1999), aff'd, *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999), cert. denied, *Maples v. Alabama*, 531 U.S. 830 (2000). Therefore, Claim IV is dismissed.

Claim V, paragraphs 182-184 of the petition, is procedurally barred because it was raised or addressed at trial and could have been but was not raised or addressed on direct appeal. Rules 32.2(a)(2) and (5), *ARCrP*. Therefore, Claim V is dismissed.

Claim VI, paragraph 185 of the petition, is procedurally barred because it could have been but was not raised or addressed at trial and could have been but was not raised or addressed on direct appeal. Rules 32.2(a)(4) and (5), *ARCrP*. Therefore, Claim VI is dismissed.

Claim VII.A., paragraphs 186-188 of the petition, is procedurally barred because the allegations contain

therein either were raised or addressed at trial, were raised or addressed on direct appeal or could have been but were not raised or addressed on direct appeal. Rules 32.2(a)(2), (4) and (5), *ARCrP*, *Maples v. State*, 758 So. 2d 1, 27-29 (Ala. Crim. App. 1999). Therefore, Claim VII.A. is dismissed.

Claim VII.B., paragraphs 189-192 of the petition, is procedurally barred because the allegations contained therein could have been but was not raised or addressed at trial and could have been but was not raised or addressed on direct appeal. Rules 32.2(a)(4) and (5), *ARCrP*. Therefore, Claim VII.B. is dismissed.

In the alternative, the Court finds that Claim VII.B. is deficiently pleaded in that Maples fails to identify any particular juror by name. Claim VII.B. is not specific; therefore, it is summarily dismissed. Rules 32.6(b) and 32.7(d), *ARCrP*.

Claim VII.C., paragraphs 193-195 of the petition, is procedurally barred because the allegations contained therein could have been but were not raised or addressed at trial and could have been but were not raised or addressed on direct appeal. Rules 32.2(a)(3) and (5), *ARCrP*. Therefore, Claim VII.C. is dismissed.

In the alternative, the Court finds that Claim VII.C. is deficiently pleaded in that Maples fails to identify any particular juror by name or indicate on what information he bases his belief. Claim VII.C. is not specific; therefore, it is summarily dismissed. Rules 32.6(b) and 32.7(d), *ARCrP*.

Claim VIII, paragraphs 196-198 of the petition, is procedurally barred because the allegations contained therein were either raised or addressed at trial or could have been but were not raised at trial or was raised and addressed on direct appeal or could have been but

was not raised on appeal. Rule 32.2(a)(2), (3), (4), and (5), *ARCrP*, *Maples v. State*, 758 So. 2d at 41-45. Therefore, Claim VIII is dismissed.

Claim IX, paragraphs 199-202 of the petition, is procedurally barred because it could have been but was not raised or addressed at trial and could have been but was not raised or addressed on direct appeal. Rules 32.2(a)(3) and (5), *ARCrP*. Therefore, Claim IX is dismissed.

Claim X, paragraphs 203-206 of the petition, is procedurally barred because it could have been but was not raised at trial and because it was raised and addressed on direct appeal. Rules 32.2(a)(3) and 32.2(a)(4), *ARCrP*, *Maples v. State*, 758 So. 2d at 80. Therefore, Claim X is dismissed.

Claim XI, paragraph 207 of the petition, with the exception of allegations involving ineffective assistance of counsel, is procedurally barred because these allegations either were raised or addressed at trial; could have been but were not raised at trial; could have been but were not raised on appeal or could have been and were raised on direct appeal. Rules 32.2(a)(2), (3), (4), and (5), *ARCrP*. Therefore, Claim XI is dismissed.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DURING THE GUILT-PHASE OF TRIAL

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court held that, in order to prevail in establishing that counsel's performance was ineffective, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by counsel's performance. "This requires showing that counsel's errors were so serious

as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

The burden of proof is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. Rule 32.3, *ARCrP*. "[A] review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions." *Thomas v. State*, 766 So. 2d 860, 892 (Ala. Crim. App. 1998). Judicial scrutiny of counsel's performance "must be highly deferential." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000)(en banc). "It is important to note that judicial scrutiny of an attorney's performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls." *Chandler*, 218 F.3d at 1314, n.13 (citing, *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994)). "It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance ... [n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness." *Id.* at 1314.

This presumption of reasonableness "impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced." *Id.* at 1314, n.15. "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption ... where the record is incomplete or unclear about [counsel]'s actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgement." *Id.* This presumption is like the

"presumption of innocence" in a criminal trial and, thus, must be disproved by the Petitioner." *Id.* "Never does the [State] acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner." *Id.*

Furthermore, "a [reviewing] court must avoid using 'the distorting effects of hindsight' and must evaluate the reasonableness of counsel's performance 'from counsel's perspective at the time.'" *Chandler*, 218 F.3d at 1316 (*citing*, *Strickland*, 466 U.S. at 689). "No particular set of detailed rules for counsel's conduct can satisfactorily take account the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 690. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy."" *Chandler*, 218 F.3d at 1314 (*quoting*, *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2462, 2474, 91 L.Ed.2d 144 (1986)).

"[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.2d at 1315. The Court finds that the evidence of guilt presented at trial against Maples was overwhelming.

To be entitled to an evidentiary hearing, a petition must be meritorious on its face.

> "A petition for [postconviction relief] is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts). *Thomas v. State*, [274 Ala. 531, 150 So. 2d 387 (1963)]; *Ex parte Phillips*, 276 Ala. 282, 161 So. 2d 485 (1964); *Stephens v. State*, 420 So. 2d 826 (Ala. Crim. App. 1982), sufficient to show that the petitioner is entitled to relief if those facts are true."
>
> *Ex parte Clisby*, 501 So. 2d 483, 486 (Ala. 1986).

MacEwan v. State, Ms. 1992219, 2001 WL 823699, at * 2 (Ala. July 20, 2001).

With these principles and presumptions in mind, the Court will address Maples's allegations of ineffective assistance of trial counsel.

In Claim I.A., paragraphs nine and ten of the petition, Maples alleges trial counsel were ineffective based, in part, on inadequate compensation. The underlying substantive claim was raised and rejected on direct appeal. *Maples*, 758 So. 2d at 80. The appellate courts of Alabama have rejected this claim on numerous other occasions. *See, Ex parte Smith*, 698 So. 2d 219 (Ala. 1997); *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985); *Hyde v. State*, 778 So. 2d 199 (Ala. Crim. App. 1998); *Stewart v. State*, 730 So. 2d 1203 (Ala. Crim. App. 1997); *Barbour v. State*, 673 So. 2d 461 (Ala. Crim. App. 1994). This claim fails to allege a material issue of law; therefore, it is summarily dismissed. Rule 32.7(d), *ARCrP*.

In Claim I.B.(i), paragraph 12 of Maples's petition, he alleges that trial counsel were ineffective for arguing that "[he] intentionally caused a loss of life and

that he should be guilty of at least one lesser included count of murder." (Maples' petition at p. 5)

A claim of ineffective assistance regarding trial counsel's closing argument cannot be viewed in isolation, but must be viewed in the context of the entire argument and the evidence presented at trial. *Duren v. State*, 590 So. 2d 360, 367 (Ala. Crim. App. 1990). When viewed in the proper context, the two quotes in paragraph 12 of Maples's petition from trial counsel's guilt-phase closing argument do not establish ineffective assistance of counsel.

A defense attorney's performance is not ineffective "as long as the approach taken 'might be considered sound trial strategy.'" *Chandler*, 218 F.3 at 1314, quoting *Darden v. Wainwright*, 106 S. Ct. 2464, 2474 (1986). Trial counsel's guilt phase strategy was to convince the jury that, though Maples may have been guilty of two intentional murders, he was not guilty of capital murder. Given the overwhelming evidence of guilt presented against Maples, including his videotaped confession and DNA evidence, this was a reasonable trial strategy.

Maples has failed to plead and prove that, given the facts of the case, "no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.2d at 1315. The allegation in I.B.(i) does not establish deficient or prejudicial performance on behalf of trial counsel as required by the *Strickland* test. Claim I.B.(i) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.B.(ii), paragraphs 13-17 of the petition, Maples alleges that trial counsel were ineffective for admitting that he murdered the victims pursuant to one scheme or course of conduct. In support of his

allegation, Maples quotes this Court one sentence from trial counsel's entire closing argument that covers 33 pages of record. (R. 2908-2941)

When evaluating a claim of ineffective assistance, the Eleventh Circuit has held that a reviewing court:

> "must not unnecessarily "grade counsel's performance," *Strickland v. Washington*, 104 S. Ct. at 2070, and this admonition seems particularly compelling in the case of closing argument, an inherently subjective task."

Thompson v. Wainwright, 787 R.2d 1447, 1455 (11th Cir. 1986).

When read in the context of trial counsel's entire closing argument and the evidence presented at trial, it is obvious that trial counsel was arguing that Maples suffered from some form of diminished capacity and that he did not murder the victims with the intent to rob Terry. This was in keeping with trial counsel's strategy that, though Maples may have been guilty of intentional murder, he was not guilty of capital murder. Trial counsel never told the jury that Maples was "guilty as charged" as Maples contends in his petition.

Maples has failed to plead or prove that, even if trial counsel erred, "that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Claim I.B.(ii) does not establish deficient or prejudicial performance on behalf of trial counsel as required by the *Strickland* test. Claim I.B.(ii) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.C.(i), paragraphs 18-23 of the petition, Maples alleges that trial counsel were ineffective for

failing to present a defense based on intoxication. Maples contends that there was extensive evidence that he was intoxicated on the night of the murders. This Claim is not supported by the record. *See Maples*, 758 So. 2d at 24. Evidence was presented that Maples consumed alcohol before the murders and possessed illegal drugs after the murders. No evidence was presented at trial establishing that Maples was intoxicated at the time of the murders to the degree that he was incapable of forming the specific intent to kill. *See, Williams v. State*, 710 So. 2d 1275, 1332 (Ala. Crim. App. 1996)(holding voluntary intoxication must amount to insanity rendering defendant incapable of forming specific intent to commit crime). Maples fails to plead any facts in his petition that were available to his trial counsel that would have established such extreme intoxication.

Moreover, not presenting evidence of intoxication during the guilt-phase of trial could have been a strategic choice by trial counsel given that Maples stated in his videotaped confession, which was admitted into evidence, that he was not intoxicated at the time of the murders.

Maples's contention that any reasonable attorney would have presented an intoxication defense presents the wrong standard of review for courts reviewing post-conviction petitions. As pointed out by the State, the Eleventh Circuit in *Chandler v. United States*, 218 F.3d 1305, 1315, 1318 (11th Cir. 2000) (en banc) held:

> [B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, *a petitioner must establish that no competent counsel would have taken the action that his counsel did take.*

> [C]ounsel's reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.

(Emphasis added)

In claim I.C.(i), Maples fails to plead facts which, if true, would entitle him to relief. Given the overwhelming evidence against him, Maples has failed to establish that the line of defense taken by his trial counsel was unreasonable; thus, he fails to demonstrate that trial counsel's performance was deficient or prejudicial. Claim I.C.(i) is without merit; therefore, it is dismissed. Rule 32.3, 32.6(b), 32.7(d), *ARCrP*.

In claim I.C.(ii), paragraphs 24-28 of the petition, Maples contends that trial counsel were ineffective for not requesting jury instructions on intoxication and manslaughter. The underlying substantive issue was raised on direct appeal. The Court of Criminal Appeals held that no plain error had occurred because "there was no rational basis for an instruction on intoxication and manslaughter under the evidence presented in this case." *Maples*, 758 So. 2d at 24.

Based on the holding of the Court of Criminal Appeals, Maples is unable to establish that trial counsel's performance caused him to suffer any substantial prejudice, thus, he is unable to establish ineffective assistance under the *Strickland* test. *Williams v. State*, 783 So. 2d 108, 133 (Ala. Crim. App. 2000). Claim I.C.(ii) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.D.(i), paragraphs 30 and 31 of Maples's petition, he alleges that trial counsel were ineffective

for failing to "challenge the State's proof regarding [his] intent to rob at the time of the incident." (Maples's petition at p. 11) Specifically, Maples argues that trial counsel failed to "introduce available evidence that [he] had access to Mr. Terry's vehicle prior to the incident and could have taken it without force." Id.

Maples has failed to specifically identify what evidence was available to trial counsel to prove he had access to the victim's car before the murders. Additionally, Maples has failed to indicate how evidence that he had access to Terry's vehicle before the murders, even if it was available and admissible, would have been relevant to establish that Maples did not possess the intent to rob Terry of his vehicle on the night of the murders.

Maples has failed to carry his burden of pleading and proving his trial counsel's performance was deficient or that he was prejudiced. Claim I.D.(i) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.D.(ii), paragraphs 32-35 of the petition, Maples alleges that trial counsel were ineffective for failing to "challenge the introduction of prejudicial and irrelevant testimony received during the guilt phase of [his] trial". (Maples's petition at p. 12) Specifically, Maples argues the testimony of James Smith and Trevor Nickens was "irrelevant and highly prejudicial". Id.

Smith testified that Maples was driving Terry's vehicle shortly after the murders and that Maples was attempting to sell items that were in Terry's car. Nickens testified that he bought a pool cue from Smith, who had bought it from Maples. Maples also argues that Jennifer Clem's testimony that Maples cashed a

$300 check made out to Terry the day after the murders "served no legitimate purpose ... other than to prejudice the jury against [him]." (Maples's petition at p. 13)

Maples's possession of Terry's property shortly after the murders was admissible and highly relevant. The Court of Criminal Appeals has held:

> The unexplained possession of recently stolen property is a circumstance from which the finder of fact can infer that the person in possession of the property is guilty of stealing it.

S.W. v. State, 703 So. 2d 427, 431 (Ala. Crim. App. 1997).

The Court of Criminal Appeals has also observed:

> "Evidence of the accused's commission of another crime is admissible if such other crime is inseparably connected with or is part of the res restae of the now-charged crime. This rule is often expressed in terms of the other crime and the now-charged crime being parts of one continuous transaction or one continuous criminal occurrence." C. Gamble, *McElroy's Alabama Evidence* (3rd ed. 1977, § 69.01(3).

Windsor v. State, 683 So. 2d 1027, 1035 (Ala. Crim. App. 1994).

The evidence of Maples's possession of Terry's car and other items belonging to Terry shortly after the murders was highly relevant to prove Maples intended to rob Terry at the time he murdered him. Because this evidence was relevant and admissible to prove the robbery element of Count II of the indictment, trial counsel had no basis to object and, thus, is not ineffective for failing to do so. *See Thomas v. Jones*,

891 F. 2d 1500, 1505 (11th Cir. 1989) (holding defense counsel did not err in failing to object to admissible evidence) Claim I.D.(ii) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.D.(iii), paragraphs 36-44 of the petition, Maples alleges trial counsel failed to adequately cross-examine certain witnesses presented by the State during its case-in-chief.

In paragraph 37, Maples alleges trial counsel failed to cross-examine April Phillips regarding: (1) her "relationships with and possible drug connections to" Barry Robinson, Frank Meinen, or John Lansdale; (2) whether Robinson, Meinen or Lansdale had any drug disputes with Maples; or (3) Maples's physical state and intoxicated appearance shortly after the murders.

Concerning the first allegation, Maples fails to plead and prove any relationship existed between Phillips, Robinson, Meinen, and Lansdale and, if there was, that it had anything to do with drugs. Alleging that trial counsel were ineffective for failing impeach Phillips regarding a 'possible" drug relationship is deficient unless Maples pleads and proves that there was, in fact, such a relationship. *Thomas v. State*, 766 So. 2d 860, 892 (Ala. Crim. App. 1998). Even assuming, arguendo, that Maples pleaded this allegation with sufficient specificity, he would then have the burden of proving that impeaching Phillips would have resulted in a different outcome at trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Maples has failed to carry his burden of pleading facts that, if true, would prove his trial counsel's performance was deficient or that he was prejudiced as required by the *Strickland* test. The first allegation

contained in paragraph 37 is deficiently pleaded; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

Concerning the second allegation, Maples fails to plead and prove that Phillips had any knowledge that Maples, Robinson, Meinen, and Lansdale had, in fact, had disputes over drugs. As previously indicated, alleging that Phillips *may* have known of such disputes, if they existed, is deficient unless he pleads specific facts that, if true, would prove that such information actually existed and that such information would have caused a different outcome at trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Maples fails to carry his burden of pleading and proving his trial counsel's performance was deficient or that he was prejudiced as required by the *Strickland* test. The second allegation contained in paragraph 37 is deficiently pleaded; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

Concerning the third allegation, Phillips testified that, though Maples did not appear hurt, he "looked like he had been in fight," and had blood on him. (R. 1891) A claim in a Rule 32 petition that is refuted by the record is without merit. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because Phillips testified regarding Maples's physical appearance, this allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*. Additionally, Maples provides no evidence to the Court that, if asked, Phillips would have testified that he appeared intoxicated.

Maples has failed to carry his burden of pleading and proving his trial counsel's performance was deficient or that he was prejudiced as required by the

Strickland test. Because the third allegation contained in paragraph 37 is without merit; it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 38, Maples alleges that trial counsel should have impeached Stephen Tant's testimony that Tant's consent to search their room at a Nashville motel was voluntary with information that police threatened him with guns. The Court of Criminal Appeals found, as supported by the record, that not only was Tant's consent to search voluntary, but that he suggested signing a written consent to search. Maples has failed to provide this Court with any facts by way of an affidavit or even a proffer that Tant's consent was involuntary in any way. Maples has failed to plead and prove that trial counsel had impeaching information regarding Tant's consent but failed to present it.

Maples has failed to carry his burden of pleading facts that, if true, would establish his trial counsel's performance was deficient or that he was prejudiced as required by the *Strickland* test. The allegation in paragraph 38 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 39 of the petition, Maples alleges that trial counsel failed to elicit information from James Dobbs. Maples alleges that trial counsel failed to elicit from Dobbs: (1) information about a conversation Maples had with Dobbs shortly before the murders; (2) information about Maples's "physical state and intoxicated appearance" the night of the murders; (3) information about Dobbs and Maples's "drug dealing disputes"; (4) Dobbs's "knowledge that certain people sought to harm" Maples; (5) Dobbs's "relationship with" Lansdale; (6) Dobbs's "connections

to violent drug dealers"; and (7) Dobbs's "knowledge of threats received by [Maples's] family from drug associates prior to [his] arrest." (Maples's petition at p. 15)

This laundry list of bare allegations is the sum-total of Maples's argument to this Court. Maples has failed to proffer to this Court any evidence about the substance of his conversation with Dobbs or identify specific instances of his alleged drug dealing disputes with Dobbs. Maples fails to identify any of the "certain people" he contends wanted to hurt him; fails to indicate the relevance of his relationship, if any, with Lansdale; fails to identify any of the allegedly violent drug dealers; or prove that Dobbs had any knowledge of threats made to Maples's family by anyone. Maples also fails to specifically identify any of his prior "drug associates" that made these alleged threats, or plead and prove that he was, in fact, intoxicated at the time he was at Dobbs's home.

Maples has failed to plead with any specificity how trial counsel could have proved the allegations in paragraph 39 or, if they could, that it would have changed the outcome of his trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Maples has failed to carry his burden of pleading and proving his trial counsel's performance was deficient or that he was prejudiced as required by the *Strickland* test. The allegations in paragraph 39 are deficiently pleaded and not specific; therefore, they are summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 40, Maples alleges trial counsel should have impeached his former girlfriend, Heather Davis, about statements she made to police with evidence of a letter she sent to him indicating that she might name

her unborn child after him. Maples has failed to make any kind of proffer regarding the substance of any alleged statements Davis made to police. Additionally, this Court fails to see how such information, if admissible, would have discredited Davis's testimony to such an extent that the outcome of trial would have been different. This allegation fails to establish deficient or prejudicial performance on the part of trial counsel as required by *Strickland*. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 41, Maples alleges trial counsel should have impeached John Lansdale with evidence of a police raid on his house where, according to Maples, drugs and guns where recovered. Maples also alleges trial counsel should have impeached Lansdale concerning "possible drug-related conflicts" Lansdale had with him.

Maples fails to indicate under what authority evidence of a drug raid would have been admissible to impeach Lansdale. *See Reeves v. State*, 2000 WL 1603658, at *16 (Ala. Crim. App. Oct. 27, 2000)(holding that arrest or pending charges must have a tendency to show bias or prejudice on the part of the witness in order to be admissible for impeachment); *see also*, Rule 609(b), *ARE*. Maples also fails to plead any facts that, if true, would establish there was, in fact, any drug connection between Lansdale and him. This allegation is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 42, Maples alleges that trial counsel should have impeached James Smith with evidence of his prior drug convictions or with evidence that his

testimony was in exchange for promises made by the Decatur Police. Smith testified on direct examination that he had been convicted of possessing drugs and that he was on probation at the time the murders occurred and was still on probation at the time of trial. Trial counsel had Smith admit during cross-examination that his apartment had been condemned by the City of Decatur for being a crack house and that his neighbor had sold crack cocaine. Smith also testified that his testimony was not in exchange for any promises, deals, or hope of reward from the district attorney or the sheriff's department concerning his criminal case.

Maples fails to plead any facts that would lend any credibility to his allegation that trial counsel's cross-examination of Smith was lacking in any way. Maples has failed to establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 42 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In claim I.D.(iv), paragraphs 45-53 of the petition, Maples alleges trial counsel inadequately objected to errors committed at trial. In claim 1.D.(iv)(a), paragraphs 46-53, Maples raises numerous allegations of ineffective assistance of counsel concerning the selection of the jury. In paragraph 46, Maples alleges trial counsel should have objected to this Court excusing Mary Aycock, Marvin Bundy, Wade Hensley, and Jimmy Rodgers for cause because, according to Maples, they expressed reservations about the death penalty. The record reflects that Aycock was excused for cause on defense counsel's motion, therefore, Maples's claim that trial counsel should have objected

to her removal for cause is without merit. Rule 32.7(d), *ARCrP*.

Concerning Bundy, Hensley, and Rodgers, the Court of Criminal Appeals held that this Court had "properly granted the State's challege(s) for cause". *Maples*, 758 So. 2d 74-76. Because removal for cause of these potential jurors was proper, trial counsel had no basis or duty to object. Maples has failed to plead any facts that would establish deficient or prejudicial performance on the part of his trial counsel as required by *Strickland*. The allegation in paragraph 46 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 47, Maples alleges trial counsel failed to object to the jury venire being briefed outside his presence by another judge. Maples raised the underlying substantive issue on direct appeal, making the same argument that he now makes in his petition. The Court of Criminal Appeals found no error had occurred and Maples fails to plead any additional facts that would lend any credibility to this allegation. *Maples*, 758 So. 2d 50. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by *Strickland*. Based on the Court of Criminal Appeals's holding, the allegation in paragraph 47 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 48, Maples alleges trial counsel were ineffective for failing to remove Jason Wilbanks for cause because, Maples says, Wilbanks indicated he would automatically vote for death if Maples was found guilty. The Court of Criminal Appeals reviewed the underlying substantive issue on direct appeal and held that this Court had "properly refused to excuse

[Wilbanks] for cause on this ground." *Maples*, 758 So. 2d at 28. Based on the Court of Criminal Appeal's holding, the allegation in paragraph 48 is without merit. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by *Strickland*; therefore, paragraph 48 is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 49, Maples alleges trial counsel should have objected to this Court giving the jury foreperson "heightened authority". After reviewing this Court's instructions to the jury, the Court of Criminal Appeals held no heightened authority was bestowed on the jury foreperson. *Maples*, 758 So. 2d at 61. Based on the Court of Criminal Appeals's holding, trial counsel had no basis to object. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by *Strickland*. The allegation in paragraph 49 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 50, Maples alleges trial counsel failed to object to the jury conducting a portion of its deliberations in open court. After reviewing the underlying substantive issue on direct appeal, the Court of Criminal Appeals held "[t]here is absolutely nothing in the record to indicate that any deliberations occurred in the courtroom." *Maples*, 758 So. 2d at 63. Based on the Court of Criminal Appeals's holding, trial counsel had no basis to object. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by *Strickland*. The allegation in paragraph 50 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 51, Maples alleges that trial counsel should have objected to this Court's reasonable doubt instruction. Maples raised the same grounds in the underlying substantive issue on direct appeal that he now raises in his petition. After reviewing this issue on direct appeal, the Court of Criminal Appeals held that this Court's instruction "clearly conveyed the definition of reasonable doubt to the jury" and that Maples's claim was without merit. *Maples*, 758 So. 2d at 66. Based on the Court of Criminal Appeals's holding, trial counsel had no basis to object; thus, Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 51 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 52, Maples alleges trial counsel failed to object to this Court's instruction concerning the finding of aggravating circumstances. Maples raised the underlying substantive issue on direct appeal. After reviewing the portion of the Court's instruction cited in Maples's petition, the Court of Criminal Appeals held that, "[after] reading the challenged statement in the context of the trial court's entire charge, we find no error." *Maples*, 758 So. 2d at 68. Because the Court of Criminal Appeals found no error, trial counsel had no basis to object; thus, Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 52 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.D.(iv)(b), paragraphs 54-56, Maples raises numerous allegations of ineffective assistance

concerning evidentiary issues. In paragraph 54, Maples alleges trial counsel failed to object to the chain of custody of swatches of cloth that were removed from Terry's car and analyzed for DNA. Maples raised the underlying substantive issue on direct appeal. The Court of Criminal Appeals held that Maples's claim that the State failed to establish a proper chain of custody on the swatches was "without merit, and there was no plain error in this regard." Maples, 758 So. 2d at 52. Because the State did, in fact, establish a proper chain of custody on the swatches, trial counsel had no basis to object to their admission into evidence. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 54 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 55, Maples alleges trial counsel were ineffective for failing to object to this Court's reference to evidence that was not presented to the jury. The Court of Criminal Appeals reviewed this Court's comment to the jury on direct appeal and found it "was merely part of [the trial court's] explanation about the order of the proceedings". *Maples*, 758 So. 2d at 45. Because the Court of Criminal Appeals found no error in the Court's comment, trial counsel had no basis to object; thus, Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 55 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 56, Maples alleges trial counsel were ineffective for failing to object to the introduction of his

fingerprint card from a DUI arrest and pictures of his bedroom wall containing, according to Maples, stolen street signs.

Concerning the fingerprint card, the Court of Criminal Appeals held that Maples had failed to prove its admission was prejudicial and that no plain error occurred, based in large part because the State stipulated that he had no significant criminal history. *Maples*, 758 So. 2d at 62. Based on the Court of Criminal Appeals's finding of no plain error, Maples is unable to satisfy the prejudice requirement of the *Strickland* test. *Williams*, 783 So. 2d at 133. This allegation contained in paragraph 56 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

Concerning the pictures of street signs, the Court of Criminal Appeals found that Maples had not shown the pictures "did or probably did affect one of his substantial rights". *Maples*, 758 So. 2d at 62. Based on the Court of Criminal Appeals' holdings that Maples failed to establish prejudice or prove that any of his substantial rights were affected, Maples is unable to satisfy the prejudice requirement of the *Strickland* test. This allegation contained in paragraph 56 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.D.(iv)(c), paragraph 57, Maples alleges trial counsel were ineffective for not objecting to this Court's orders regarding him giving physical exemplars. Maples raised the underlying substantive issue on direct appeal advancing the same grounds he advances in his petition. The Court of Criminal Appeals held that Maples's claim was without merit. *Maples*, 758 So. 2d at 74. Because the underlying

Claim is without merit, trial counsel had no basis to object and Maples has failed to establish deficient or prejudicial performance on behalf of his trial counsel as required by the *Strickland* test. Claim 1.D.(iv)(c) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.E., paragraphs 58-67 of the petition, Maples alleges trial counsel failed to secure expert assistance in his defense. In claim I.E.(i), paragraphs 59-62, Maples alleges that trial counsel were ineffective for not having Dr. Allen Shealy explain Maples's flat affect and demeanor to the jury. Maples alleges, "[u]pon information and belief, these qualities may have made a negative impression on the jurors." In addition to being purely speculative, Maples fails to prove this Court with any facts upon which he bases his belief that his affect and demeanor had any effect on the jury. Maples has failed to plead any factual basis that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.E.(i) is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In claim I.E.(ii), paragraphs 63 and 64 of the petition, Maples alleges that trial counsel were ineffective for failing to request funds for a pharmacologist or neuro-pharmacologist or "other drug expert" to testify regarding the effects the drugs he consumed on the day of the murders. Maples fails to plead facts that would establish what a pharmacologist or neuro-pharmacologist's testimony would have been or that their testimony would have even been favorable to his defense. *Thomas v. State*, 766 So. 2d 860, 893 (Ala. Crim. App. 1998) (holding that a claim of failure to

call a witness is deficient unless the petitioner shows what the witness's testimony would have been and how it might have changed the outcome of trial). Maples has failed to plead any factual basis that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.E.(ii) is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In claim I.E.(iii), paragraphs 65-67 of the petition, Maples alleges trial counsel were ineffective for failing to request a ballistics expert and a blood spatter expert. Maples fails to indicate what the testimony of these experts would have been and how such testimony might have changed the outcome of the proceedings. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. *See also*, *Thomas*, 766 So. 2d at 893. Maples has failed to plead any factual basis that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.E.(iii) is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In claim I.F., paragraphs 68-81 of the petition, Maples alleges trial counsel were ineffective for failing to adequately argue and obtain favorable rulings on certain motions.

In claim 1.F.(i), paragraph 68-72 of the petition, Maples alleges that trial counsel failed to move to suppress evidence from a warrantless search of his hotel room and his videotaped statement to police. The grounds Maples advances in his petition were reviewed by the Court of Criminal Appeals for plain error. The record refutes Maples's allegation that his roommate's consent was involuntary. The Court of Criminal

Appeals found that "[Tant] testified that he was not coerced into consenting to the search; in fact, he testified that he suggested that he sign a paper so the officers could conduct the search." *Maples*, 758 So. 2d at 24. Because this allegation is directly refuted by the record, Maples is unable to establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999)(hold that a claim that is refuted by the record is without merit). This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

Maples also alleges trial counsel should have challenged Tant's authority to give consent to search his room. Maples raised the underlying issue on direct appeal. Tant testified that part of his pay was being allowed to live at the motel and that he was allowing Maples to stay in the room with him at the time it was searched. The Court of Criminal Appeals concluded that "the evidence showed that Tant was a joint occupant of the motel room and that he had joint access to the room, [therefore] he had the authority to consent to a search of the room." *Maples*, 758 So. 2d at 26. Based on the testimony presented at trial and the appellate court's ruling, even if trial counsel had raised this issue at trial, it would have failed. *Gibby*, 753 So. 2d at 1207-1208. Maples has failed to plead any facts that would establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

Maples alleges trial counsel were ineffective for not objecting to the admission of a T-shirt that was seized

during the search of his room. On direct appeal, the Court of Criminal Appeals held that because Tant could consent to the search of the room, the police had authority to seize the T-shirt. *Maples*, 758 So. 2d at 26. The Court of Criminal Appeals also concluded that the admission of the T-shirt was highly relevant because the bloodstains on it matched Robinson's blood and thus, "connected [Maples] to Barry Robinson's death and corroborated his statements to police." *Maples*, 758 So. 2d at 39. Maples has failed to plead any facts that establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In paragraph 71, Maples alleges trial counsel were ineffective for not having his videotaped statement suppressed on the grounds that it was coerced and involuntary given. Maples raised the underlying issue on direct appeal. The Court of Criminal Appeals determined that Maples's demeanor during the videotaped confession "reflected that he was coherent and fully understood what he was doing." *Maples*, 758 So. 2d at 44. The Court of Criminal Appeals went on to say that there was no evidence that any police officer "physically intimidated or psychologically pressured [Maples] or used any "strong-arm" tactics to coerce him to confess." *Maples*, 758 So. 2d at 44-45. Because the record refutes the allegation in paragraph 71, it is without merit. *Gibby*, 753 So. 2d at 1207-1208. Maples has failed to plead any facts that would establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Therefore, paragraph 71 is dismissed. Rules 32.3, 32.6(b), 32.7(d), *ARCrP*.

In paragraph 72 of Maples's petition, he contends that trial counsel's numerous and repeated failures in claim II.F.(), individually and cumulatively, cause him prejudice. For the reasons stated above, however, the State has demonstrated that Maples has failed to prove in claim II.F.(i) deficient performance or prejudice on the part of trial counsel. The allegation in paragraph 72 is without merit; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*, *Nicks v. State*, 1999 WL 784122, at *7 (Ala. Crim. App. Oct. 1, 1999) (holding that where no single allegation in a Rule 32 petition warranted relief, the Court of Criminal Appeals would not consider the cumulative effect).

In claim I.F.(ii), paragraphs 73 and 74 of the petition, Maples alleges trial counsel were ineffective for failing to adequately argue for records from the Alabama Board of Pardons and Parole on "a number of potential witnesses." Maples fails to identify any witness by name or indicate what information contained in these records would have been impeaching or exculpatory. Maples has failed to establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.F.(ii) is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.F.(iii), paragraphs 75-81 of the petition, Maples makes numerous ineffectiveness allegations regarding the jury. In paragraphs 75 and 76, Maples contends trial counsel were ineffective for not requesting individual *voir dire* after this Court had denied their motion because, Maples says, answers from some veniremembers tainted answers from other veniremembers. The Court of Criminal Appeals

reviewed the voir dire proceedings on direct appeal and found that no prejudice occurred. *Maples*, 758 So. 2d at 52. Based on the Court of Criminal Appeals's finding of no prejudice, Maples is unable to satisfy the prejudice requirement of the *Strickland* test. *Williams*, 783 So. 2d at 133. Therefore, the allegations contained in paragraph 75 and 76 are without merit; therefore, they are dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 77, Maples contends that trial counsel failed to object to certain responses made by veniremembers during voir dire. The Court of Criminal Appeals held on direct appeal that the method of voir dire employed by this Court did not prejudice Maples. The allegation in paragraph 77 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 78, Maples contends trial counsel should have secured the use of a juror questionnaire. Maples raised the underlying issues on direct appeal.

Regarding the use of a questionnaire, the Court of Criminal Appeals held that "trial courts are not required to allow the use of jury questionnaires, even in capital cases." *Maples*, 758 So. 2d 51. The Court of Criminal Appeals went on to hold that this Court "did not err in denying [Maples's] motion for a jury questionnaire." *Id.*

Maples had failed to establish that trial counsel's performance during voir dire was deficient or that he was prejudiced in any way by this Court's method of voir diring the venire as required by the *Strickland* test. Based on the holds of the Court of Criminal Appeals, this allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 79, Maples alleges that, "[u]pon information and belief, certain jurors may have been reluctant to admit any bias, especially with respect to their beliefs about the death penalty." Maples fails to provide this Court with the information upon which he bases his belief and does not identify a single prospective juror that was reluctant to answer any question on voir dire because of the method employed. Likewise, Maples's allegation that group voir dire caused venire members to not truthfully answer all questions asked them is nothing but a bare allegation based on speculation and conjecture and fails to establish trial counsel were ineffective during voir dire. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. These allegations are deficiently pleaded and are not specific; therefore, they are summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 80, Maples alleges trial counsel were ineffective for ailing to remove for cause certain venire members who were familiar with law enforcement, state witnesses, other prospective jurors, the district attorney, or facts of the case. As pointed out by the State, nowhere in paragraph 80 does Maples allege that the named jurors had a fixed opinion about his guilt or that their knowledge of facts or individuals influenced their verdicts. While the responses listed by Maples may have supported a peremptory strike, without more they would not have supported removal for cause. *See Whitehead v. State*, 777 So. 3d 781, 808 (Ala. Crim. App. 1999). Maples has failed to plead any facts which, if true, would entitle him to relief and has failed to establish trial counsel's performance was deficient or that he was prejudiced as required by the *Strickland* test. The allegations in paragraph 80 are deficiently

pleaded; therefore, they are dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 81, Maples contends that trial counsel's numerous and repeated failures in claim II.F.(iii), individually and cumulatively, cause him prejudice. For the reasons stated above, however, the State has demonstrated that Maples has failed to prove in claim II.F.(iii) deficient performance or prejudice on the part of trial counsel. The allegation in paragraph 81 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*, *Nicks v. State*, 1999 WL 784122, at *7 (Ala. Crim. App. Oct. 1, 1999) (holding that where no single allegation in a Rule 32 petition warranted relief, the Court of Criminal Appeals would not consider the cumulative effect).

In claim I.G., paragraphs 82-84 of the petition, Maples alleges that trial counsel failed to adequately question and investigate veniremembers and their backgrounds. Maples fails, however, to plead and prove that the venire member's listed in his petition past associations with each other or prior knowledge of the case had any effect on the verdicts returned against him. Maples has failed to meet his burden of pleading specific facts that, if true, would establish deficient performance by trial counsel or that prejudice to him as required by the *Strickland* test. Claim I.G. is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.H., paragraphs 85 and 86 of the petition, Maples alleges that trial counsel were ineffective during the guilt-phase of trial for failing to request only guilty forms regarding the lesser-included offenses be submitted to the jury. This Court informed the jury

they could consider lesser-included offenses only if they found Maples not guilty of capital murder. This Court also instructed the jury that, if they found Maples lot guilty of all charges, that they should have entered that verdict on the form concerning Count I. (R. 3017) Jurors are presumed to follow the Court's instructions. *Maples*, 758 So. 2d at 53. Maples has failed to plead any facts that, if true, would entitle him to relief. Claim I.H. is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.I., paragraphs 87-92 of the petition, Maples alleges trial counsel were ineffective for failing to properly investigate the charges against him. Maples contends that trial counsel met with him only "a few occasions prior to trial," and did not discover information from his parents that, according to Maples, would have been "useful in his defense."

The Court of Criminal Appeals has held that:

> claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.

Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998), citing, *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993).

These allegations, and the others listed in claim I.I., fail to indicate what specific information trial counsel would have discovered and how it would have changed the outcome of his trial. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.I. is deficiently pleaded and is

not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.J., paragraphs 93-110 of the petition, Maples alleges trial counsel were ineffective for failing to object to numerous instances of prosecutorial misconduct. In claim I.J.(i), paragraph 94, Maples alleges trial counsel failed to object to the State raising an aggravating factor without giving him notice. The Court notes that the portion of the State's closing argument Maples cites in his petition occurred during the guilt-phase of trial, not the penalty-phase. Additionally, this Court specifically instructed the jury that the only aggravating circumstance they could consider was that the capital offense occurred during the course of a robbery. (R. 3323) Jurors are presumed to follow instructions of the Court. *Maples*, 758 So. 2d at 53. Maples has not pleaded any facts that would establish the jury went against this Court's instructions and considered other aggravating factors in its recommendation. Maples has failed to plead any facts that would establish trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. Claim I.J.(i) is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.J.(ii), paragraphs 95-102 of the petition, Maples alleges trial counsel failed to object to numerous instances of prosecutorial misconduct during the guilt-phase of trial. In paragraph 96, Maples alleges trial counsel did not object to the prosecutor telling the jury what the truth was. The Court of Criminal Appeals reviewed the instances cited in Maples's petition and held they were proper comments drawn from the evidence and that Maples was not

prejudiced by them. *Maples*, 758 So. 2d at 59. Because the prosecutor's comments were proper, trial counsel had no basis to object. And, because of the Court of Criminal Appeals's holding that Maples was not prejudiced by these comments, he cannot meet the requirements of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 96 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 97, Maples alleges trial counsel did not object to the prosecutor telling the jury they should send a message to the community through their verdict. Maples raised the underlying substantive issue on direct appeal. The Court of Criminal Appeals held that the prosecutor's comment was proper. *Maples*, 758 So. 2d at 59. Trial counsel cannot be ineffective for failing to object to a proper comment made by the prosecution. Because of the Court of Criminal Appeals's holding that Maples was not prejudiced, he cannot meet the requirements of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 97 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 98, Maples alleges that trial counsel did not object to the prosecution reading the indictment to the jury. The Court of Criminal Appeals reviewed the underlying substantive issue on direct appeal and held that the prosecutor's reading of the indictment was not improper. *Maples*, 758 So. 73. Trial counsel cannot be ineffective for failing to object to a proper comment made by the prosecution. Because of the Court of Criminal Appeals's holding that Maples was not prejudiced, he cannot meet the requirements of the *Strickland* test. *Williams*, 783 So.

2d at 133. The allegation in paragraph 98 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 99, Maples alleges the prosecutor improperly stated his own views and convictions about the case. The Court of Criminal Appeals reviewed the instances Maples cites in his petition on direct appeal and held that he was not prejudiced by the prosecutor's comments. *Maples*, 758 So. 2d at 59. Because Maples was not prejudiced by these comments, trial counsel was not ineffective for failing to object and Maples cannot meet the requirements of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 99 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 100, Maples alleges trial counsel failed to object to the prosecutor commenting on his decision not to testify. Maples raised the underlying substantive issue on direct appeal. The Court of Criminal Appeals held the prosecutor's statement was "[was] an obvious comment about [Maples's] taped statement to police that was admitted into evidence." *Maples*, 758 So. 2d at 21. Trial counsel cannot be ineffective for failing to object to a proper comment made by the prosecution. Because of the Court of Criminal Appeals's holding that Maples was not prejudiced, he cannot meet the requirements of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 100 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 101 of Maples's petition, he contends that trial counsel's numerous and repeated failures in claim II.J.(ii), individually and cumulatively, cause him prejudice. For the reasons stated above, however, the

State has demonstrated that Maples has failed to prove in claim II.J.(ii) deficient performance or prejudice on the part of trial counsel. The allegation in paragraph 101 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*, *Nicks v. State*, 1999 WL 784122, at *7. (Ala. Crim. App. Oct. 1, 1999) (holding that where no single allegation in a Rule 32 petition warranted relief, the Court of Criminal Appeals would not consider the cumulative effect).

In paragraph 102, Maples alleges that, because trial counsel failed to object to the instances of alleged prosecutorial misconduct in claim I.J.(ii), the appellate courts reviewed the claims under the stringent plain error standard and rejected them. Maples has failed to plead and prove, however, that even if trial counsel had preserved the alleged errors in claim I.J.(ii)(or any other claim) that results of his appeal would have been different. *Ex parte Thomas*, 766 So. 2d 975, 970 (Ala. 2000) (holding that Alabama appellate courts will not reverse a conviction or sentence even if the alleged err is preserved unless the appellant was substantially prejudiced). The allegation in paragraph 102 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.J.(iii), paragraph 103 of the petition, Maples alleges trial counsel was ineffective for failing to object to the State's use of "duplicative and unnecessar[ily] gruesome photographs" including, according to Maples, photographs of the victims after their heads had been opened during the autopsy.

None of the photographs admitted into evidence showed the victims with their heads open. The Court of Criminal Appeals confirmed this on direct appeal. *Maples*, 758 So. 2d at 77. This allegation contained in

paragraph 103 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

Concerning the remaining photographs, the Court of Criminal Appeals held that none of them unduly prejudiced Maples. *Maples*, 758 So. 2d at 78. Because Maples did not suffer any undue prejudice by the admission of the photographs, he cannot establish trial counsel's performance was prejudicial such that the result of his trial is undermined as required by *Strickland*. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim I.J.(iv), paragraphs 104-110 of the petition, Maples alleges trial counsel were ineffective for failing to object to the State's improper examination of witnesses. In paragraph 105, Maples alleges trial counsel failed to object to the State asking leading questions. The only example Maples cites in his petition was reviewed on direct appeal. The Court of Criminal Appeals found the State's examination was not improper. *Maples*, 758 So. 2d at 59. Because the question cited by Maples was not improper, trial counsel had no basis to object; thus, they were not ineffective under the *Strickland* test. The allegation in paragraph 105 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 106, Maples alleges that trial counsel failed to object to the State eliciting improper hearsay during the guilt phase of trial. Maples cites this Court to six instances in the record. Maples fails, however, to plead specifically how this testimony was prejudicial and why, if trial counsel had objected, the outcome of the trial would have been different. *Strickland*, 466 U.S. 694, 104 S. Ct. 2068. The allegation in paragraph 106 is deficiently pleaded and not specific; therefore, it

is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 107, Maples alleges trial counsel failed to object to certain testimony elicited from prosecution witness Heather Davis. In the light of the overwhelming evidence of Maples's guilt, this Court is convinced that Maples was not prejudiced by this testimony. Further, as pointed out by the State, much of the testimony from Davis upon which Maples bases this contention was cumulative. Maples has failed to plead any facts that would establish trial counsel's failure to object was due to deficient performance or caused him prejudice as required by the *Strickland* test. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 108, Maples alleges trial counsel failed to object to the prosecutor asking witnesses questions without having a proper basis. The only example provided by Maples appears to be a response from the prosecution to trial counsel's cross-examination of James Dobbs. This Court has no doubt that Maples was not prejudiced by this one question from the State during the redirect examination of Dobbs. This allegation is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 109, Maples lists four instances where, he contends, trial counsel failed to object to extraneous and irrelevant testimony. Maples alleges that trial counsel should have objected to Beverly Shawnbaum testifying that Terry was proud of his car. (R. 1817) Maples offers no argument or factual basis that this testimony was prejudicial to the point of questioning the reliability of the outcome of his trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. This allegation

contained in paragraph 109 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP.*

Maples alleges that trial counsel should have objected to testimony concerning a description of his tattoos. This testimony was in conjunction with Tant's testimony of how Maples's attitude changed after the stolen car Maples's was driving was repaired. Maples fails to plead how a description of his tattoos could have possibly been prejudicial in the eyes of the jury. This is a bare allegation with no factual support; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP.*

Maples alleges that trial counsel failed to object to a description of his clothes as a "No Fear" T-shirt. This is how Maples himself described the T-shirt in his videotaped confession to police which was admitted into evidence. Additionally, the T-shirt was admitted into evidence for the jury to consider. Maples's allegation of error is totally without merit; therefore, this allegation contained in paragraph 109 is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP.*

Maples alleges trial counsel should have objected to the introduction of a note he wrote to Tant thanking him for letting Maples stay with him in the motel. In the light of the testimony from Tant at trial and Maples's own confession, the introduction of the note would have been cumulative and any error, at the very most, would have been harmless. Maples cannot establish that trial counsel's performance was deficient or prejudicial under the *Strickland* test. This allegation contained in paragraph 109 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP.*

In paragraph 110 of Maples's petition, he contends that trial counsel's numerous and repeated failures in claim II.J.(iv), individually and cumulatively, caused him prejudice. For the reasons stated above, however, the State has demonstrated that Maples has failed to prove in claim II.J.(iv) deficient performance or prejudice on the part of trial counsel. The allegation in paragraph 110 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*, *Nicks v. State*, 1999 WL 784122, at *7 (Ala. Crim. App. Oct. 1, 1999) (holding that where no single allegation in a Rule 32 petition warranted relief, the Court of Criminal Appeals would not consider the cumulative effect).

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DURING THE PENALTY-PHASE OF TRIAL

In claim II.A., paragraphs 115-129 of the petition, Maples alleges trial counsel were ineffective during the penalty-phase of trial for failing to adequately investigate his family history and character for mitigation evidence.

In paragraphs 115-116 of Maples's petition, he alleges trial counsel failed to present evidence of his "tortured upbringing" and abusive circumstances of his early youth. This allegation is directly refuted by the record.

Dr. Allen Shealy, an expert in forensic psychology, testified for Maples during the penalty phase of trial. Shealy stated that Maples said that his biological mother "beat him a lot," that "[h]e remembers being tied to a chair and whipped with a broom handle," and that "his mother was crazy, that she had stabbed his father and poured hot grease on [his father] while he

was asleep." (R. 3126). Shealy indicated that Maples remembered his biological mother leaving him when he was three years old and that the abuse and abandonment of Maples at the hands of his biological mother would have had "a lot of long-term effects". (R. 3137)

A claim that is refuted by the record on direct appeal is meritless. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because this allegation is directly refuted by the record, Maples has failed to establish that trial counsel's performance was deficient or prejudicial under the requirements of the *Strickland* test. The allegation in paragraph 115 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 116, Maples alleges trial counsel were inadequate in conveying the "trauma and abuse" he suffered though the testimony of his father, Philip Maples. This claim is refuted by the record.

Maples's father testified that Maples's biological mother "is just the woman that had him," that "she's a nut case" and "tried to kill [Maples] and [Philip Maples] on several different occasions." (R. 3194) Philip Maples said that Cory's biological mother "beat [Cory Maples] on several occasions, choked him, left him in the car with the windows rolled up, slapped him, you know, just crazy stuff." (R. 3195) Philip Maples testified he had seen rope marks on his son's arms from where his biological mother had tied him up. Philip Maples also testified that his ex-wife had stabbed him and poured hot grease on him while he slept. Regarding her temper, Philip Maples stated that "[y]ou could be talking to her one minute and she would be

fine and the next minute she was a whole other person in the world." (R. 3196)

A claim that is refuted by the record on direct appeal is meritless. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because this allegation is directly refuted by the record, Maples is unable to establish that trial counsel's performance was deficient or prejudicial under the requirements of the *Strickland* test. The allegation in paragraph 116 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 117 of Maples's petition, he alleges that trial counsel "made no attempt to contact any former friends or associates" of his biological mother. Maples fails to identify any of these alleged former friends and associates of his biological mother in his petition or indicate what evidence or testimony these individuals would have provided. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Maples has failed to plead any fact that, if true, would entitle him to relief under the *Strickland* test. The allegation in paragraph 117 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 118 of Maples's petition, he alleges that trial counsel were ineffective for failing to "attempt to contact [Maples's biological mother] although her testimony would have further revealed extensive mitigating circumstances." (Maples's petition at p. 52)

Maples fails to indicate how trial counsel could have contacted his biological mother or indicate what "extensive mitigating circumstances" she would have testified about. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Maples has failed to plead any fact that, if true, would entitle him to relief under the *Strickland* test. The allegation in paragraph 118 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 119, Maples alleges that trial counsel failed to show how his biological mother's second abandonment affected his mental and emotional health. This allegation is refuted by the record.

Philip Maples testified when Maples came back from living with his biological mother that he was changed. Philip Maples said his son's mind wandered a lot, that he would not check in when he went out and heard that Maples was "running around" with people that were known to be into drugs. (R. 3199) Philip Maples testified about getting Cory treatment for his drug addiction and how treatment was beneficial to him.

A claim that is refuted by the record on direct appeal is meritless. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because this allegation is directly refuted by the record, Maples is unable to establish that trial counsel's performance was deficient or prejudicial is required by the *Strickland* test. The allegation in paragraph 119 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 120, Maples alleges trial counsel were ineffective for failing to elicit from Philip Maples that his biological mother and maternal grandmother shared the same mental illness. Maples provides no factual or documentary evidence by way of affidavits, medical, or hospital reports to support the allegation that either his biological mother or maternal grandmother did, if fact, suffer from a mental illness.

Maples has failed to plead and prove that information concerning his biological mother's alleged mental illness was available at the time of trial or that, if it were, its presentation to the jury and judge would have cause the outcome to be different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The allegation in paragraph 120 is deficiently pleaded and is not specific; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 121, Maples alleges trial counsel should have elicited testimony from his father about Maples's "good moral character despite his abusive childhood." (Maples's petition at p. 53)

While Philip Maples did not testify concerning his son's "good moral character," Elyse Maples, Cory's step-mother since he was three years old, testified that Maples was a "very fun loving" child that "enjoyed being around other kids a lot." (R. 3176) Elyse testified that Maples "was a typical boy," that he "was adventuresome," and "wasn't somebody that got into trouble a lot." (R. 3177) Elyse said that Maples "did very well in school" and "was very smart.' (Id.) Elyse testified that Maples tested above average intelligence and was in special class until "the sixth or seventh grade and then his grades started falling." (R. 3178)

A claim that is refuted by the record on direct appeal is meritless. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because this allegation is refuted by the record, Maples is unable to establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. The allegation in paragraph 121 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and *ARCrP*.

In paragraph 122, Maples alleges trial counsel were ineffective for failing to thoroughly interview Elyse Maples. Maples contends trial counsel could have learned more from Elyse about how his biological mother abused him and about his "history or witnessing traumatic events, as well as to [his] past head traumas." (Maples's petition at p. 53)

Maples fails to indicate what additional facts trial counsel could lave learned had they more thoroughly interviewed his stepmother. Maples also fails to provide this Court with any specific instances of him witnessing traumatic events or occurrences of head trauma that Elyse Maples could have related to the jury and this Court or how testimony of these events (if, in fact, they occurred,) would have changed the outcome of his sentencing. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The allegation contained in paragraph 122 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 2.7(d), *ARCrP*.

In paragraph 123, Maples alleges trial counsel failed to elicit testimony from his step-mother that, though Maples dropped out of school, he passed the GED exam, and attempted to enlist in the Army, but was rejected because of drug problems.

"'The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.'" *Chandler*, 218 F.3d at 1316 n. 20, quoting, *Waters v. Thomas*, 46. F. 3d 1506, 1514 11th Cir. 1995)(en banc). Maples has failed to plead and prove that any addition testimony from his stepmother would have resulted in a different recommendation by the jury or a different sentence by this Court. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The allegation in paragraph 123 contains no factual or legal basis upon which relief could be granted. The allegation in paragraph 123 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 124, Maples alleges that trial counsel's examination of James Maples, his paternal uncle, "was brief, cursory, and ineffective," and that trial counsel should have interviewed "other family relatives" to learn more about his "good moral character and friendliness." (Maples's petition at pp. 53-54)

Even though James Maples's testimony may not have been helpful, Maples fails to indicate how the testimony of his uncle was prejudicial. Maples also fails to identify any particular family member by name or indicate what testimony such a family member would have given. The Court of Criminal Appeals has held that "[t]here has never been a case where additional witnesses could not have been called." *Fortenberry v. State*, 659 So. 2d 194, 199 (Ala. Crim. App. 1994), quoting, *State v. Tarver*, 629 So. 2d 14, 21 (Ala. Crim. App. 1993). The Criminal Court of Appeals has also held that "[a] claim of failure to call witnesses is deficient if it does not show what the witnesses would

have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Maples has failed to establish that trial counsel's performance was deficient or prejudicial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. This allegation is deficiently pleaded and is not specific; therefore, paragraph 124 is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 125, Maples alleges that "other family members" would have testified about his personal traits, that he was abused by his biological mother, and that "at least one family member saw [Maples's biological mother] physically abuse [him]." (Maples's petition at p. 54)

Maples fails to identify any of these "other family members" by name or indicate with any specificity what their testimony would have been. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. In the light of Philip Maples and Dr. Shealy's testimony, any additional testimony regarding alleged abuse that Maples suffered at the hands of his biological mother would have been, at best, cumulative. Maples has failed to establish that trial counsel's performance was deficient or prejudicial for failing to call additional family members to testify during the penalty phase. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The negation in paragraph 125 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 126, Maples alleges that Daniel Maples, his half brother, would have testified that Cory

was "a fun, loving brother who respected his father and did what he was told," in addition to looking out for Daniel regarding drugs.

"There has never been a case where additional witnesses could not have been called." *Fortenberry v. State*, 659 So. 2d 194, 199 (Ala. Crim. pp. 1994), quoting, *State v. Tarver*, 629 So. 2d 14, 21 (Ala. Crim. App. 1993). Additionally, the Court of Criminal Appeals has held:

> "We refuse to set a standard that a court may be reversed because it did not hear unoffered testimony from still more friends and relatives. We also refuse to say that a member of the bar is guilty of ineffectiveness for not calling every witness and friend who was willing to testify."

Williams v. State, 782 So. 2d 811, 824 (Ala. Crim. App. 2000), quoting, *State v. Tarver*, 629 So. 2d 14, 21 (Ala. Crim. App. 1993).

Maples has failed to proffer the Court any evidence that testimony from his half brother would have produced a different result in the penalty phase of trial. *Strickland*, 466 U.S. at 694, 104 S. Ct at 2068. The allegation in paragraph 126 contains no legal basis that would entitle Maples to relief. Paragraph 126 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

Maples alleges throughout claim II.A., particularly in paragraphs 127-129 of his petition, that trial counsel were ineffective for not presenting mitigation evidence from teachers, coaches, and administrators at his high school or testimony from his friends.

Maples fails, however, to identify any of these individuals from his high school or any of his "friends"

by name. Additionally, Maples fails to indicate what any particular individual would have said if called to testify. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Maples has failed to establish that trial counsel's performance was deficient or prejudicial as required by the *Strickland* test. This allegation is deficiently pleaded and is not specific; therefore, it is dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In claim II.B., paragraphs 130-132 of Maples's petition, he alleges trial counsel were ineffective for failing to adequately investigate his drug addiction, depression, and attempted recovery. In paragraph 130, Maples alleges his father and stepmother "could have more thoroughly testified to [his] dedication to conquering his drug problems." (Maples's petition at p. 56) Also, Maples alleges trial counsel did not contact any counselors from the Quest Treatment Center who interacted with him.

Maples fails to indicate what additional testimony his father and step-mother could have provided that would have caused a different result in the jury's recommendation or this Court's sentencing. Maples also fails to identify any drug counselor by name or indicate what his or her testimony would have been.

"A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. The allegation in paragraph 130 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 131, Maples alleges trial counsel were ineffective for not subpoenaing "a friend" to testify that Maples worked with in Tennessee. Maples fails to provide the Court with the name of this "friend" and only speculates that his testimony regarding Maples's hard work "could have been a mitigating factor." (Maples's petition at p. 56) Also, Maples's allegation that trial counsel failed to contact "any employer" regarding his work ethic also lacks any specificity whatsoever.

"A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. The allegation in paragraph 131 is deficiently pleaded and is not specific; therefore, it is dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In paragraph 132, Maples alleges that trial counsel were ineffective because they "did not call many potential witnesses who were sources of important information about [his] life". (Maples's petition at p. 56) Maples fails to identify these potential witnesses by name or indicate what "important information" their testimony would have revealed. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. The allegation in paragraph 132 is deficiently pleaded and is not specific; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In claim II.C., paragraphs 133 and 134 of Maples's petition, he alleges that trial counsel were ineffective for not obtaining a mitigation expert. Maples contends

that "[a] mitigation expert would have testified to the lingering psychological impact that growing up in an abusive family environment had on [him]," and "could have developed a social, medical and family history' concerning Maples. (Maples's petition at p. 57) Maples also contends that a mitigation expert would have aided in supporting "motions for other experts [and] develop[ing] exhibits." (Id.) Maples alleges that he would have been entitled to a mitigation expert under the authority of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985).

In applying the principal of *Ake* to non-mental health experts, the Alabama Supreme Court has held:

> The *Ake* principal ... appl[ies] to assistance by nonpsychiatric experts when an indigent defendant makes a proper showing that the requested assistance is needed in order for the defendant to have "a fair opportunity to present his defense." *Dubose[v. State]*, 622 So.2d [1189] at 1194 [(Ala. 1995)]. Specifically, a defendant, in order to be entitled to funds to pay for an expert, must show more than a mere possibility that he or she will receive useful assistance from the expert. Rather, the defendant must show a reasonable probability that the expert would aid in the defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial.

Ex parte Dobye, 672 So. 2d 1354, 1357 (Ala. 1995).

Alleging what a mitigation expert "would have testified to" or "could have developed" is insufficient to establish that trial counsel were ineffective. To establish that trial counsel were ineffective, Maples must plead and prove what grounds were available, but not presented by trial counsel, that would have

satisfied the requisite showing of a reasonable probability that a mitigation expert would have aided his defense.

Maples fails to identify any mitigation expert by name or provide any documentary proof to substantiate this allegation. Maples also fails to specifically identify what "other experts" or "exhibits" a mitigation expert would have developed. Claim II.C. is deficiently pleaded because it fails to allege any facts that would entitle Maples to relief; therefore, it is summarily dismissed by the Court. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In claim II.D., paragraphs 135-139 of Maples's petition, he alleges trial counsel were ineffective for failing to present evidence that he assisted law enforcement "in their enforcement of drug law violations." (Maples's petition at p. 57) Maples contends that there was documentary evidence to support this allegation as well as police officers that could have established this fact. In his petition, however, Maples fails to attach any of the alleged supporting documents, fails to identify any police officer by name, and fails to indicate what their testimony would have been, such as who was arrested and prosecuted as a result of Maples's "help".

"A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Claim II.D. contains only bare allegations with no factual basis. "[N]o purpose would be served by any further proceedings" by the Court; therefore, Claim II.D. is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In claim II.E., paragraphs 140-146 of Maples's petition, he alleges that trial counsel were ineffective for not procuring a competent psychological evaluation. In paragraph 140, Maples contends that trial counsel's psychological presentation to the jury, "upon information and belief, may have resulted in the jury's discounting much, if not all, of the psychologist's testimony." (Maples's petition at p. 59) Maples provides this Court with absolutely no evidence that any juror discounted any of Dr. Shealy's testimony.

During the penalty phase charge, this Court instructed the jury regarding how to evaluate mitigating evidence as follows:

> [A] mitigating circumstance may stem from any of the diverse frailties of human kind. Mitigating facts are facts relating to the defendant's age, character, education, environment, mentality, life, and background or any aspect of the crime itself which may be considered extenuating or make him less deserving of the extreme punishment of death by electrocution. ... You must consider a mitigating circumstance if you believe that there is any evidence to support it. When the factual existence of an offered mitigating circumstance is in dispute, the State has the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. That means that you are to consider that mitigating circumstance does exist unless, taking the evidence as a whole, it's more likely that not the mitigating circumstance does not exist.

(R. 3318, 3320-3321) Jurors are presumed to follow instruction. *Maples*, 758 So. 2d at 54.

Paragraph 140 contains only a bare allegation with no factual basis upon which relief could be granted. Therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In paragraph 141, Maples alleges trial counsel were ineffective for failing to inform Dr. Shealy of important information concerning his background. Maples proceeds to cite the Court to paragraphs 115-131 and 147-150 of his petition. Maples then makes the bare assertion that "even if [Dr. Shealy had done his job properly, he could not have done it well." (Maples's petition at p. 59)

Shealy testified that, as of the time of trial, he had been a clinical psychologist for 28 years. Shealy has an extensive list of credentials (R. 3094-3098) and was qualified as an expert by this Court. (R. 3099) Shealy indicated that, on the occasion of evaluating Maples, he did not deviate from the generally accepted procedures and testing accepted in the psychological community in general, and specifically in Alabama. Maples fails to allege, much less prove, that Shealy's diagnosis would have changed had he been given additional information. The allegation in paragraph 141 contains nothing more than a bare allegation without any factual support; therefore, it is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In paragraph 142, Maples alleges that Shealy's psychological report was "skimpy and incomplete" based on Shealy's "superficial interaction and failure to probe". (Maples's petition at p. 60) According to Maples, Shealy spent little time with him and no time with family members. Maples's allegations are based on pure speculation and fail to establish that, had Shealy spent more time with Maples or interviewed

family members, his findings would have changed. The allegation in paragraph 142 contains nothing more than a bare allegation without any factual support; therefore, it summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In paragraph 143, Maples alleges that Shealy failed to discover that Maples has suicidal thoughts, had attempted suicide, and was given anti-depressant medication in the Morgan County Jail. Maples also alleges that Shealy failed to discover more instances of his being abused as a child and failed to probe his feeling regarding his mother and the fact she abandoned him a second time.

In paragraph 144, Maples contends Shealy's diagnosis of passive-aggressive personality disorder was wrong, that Shealy's indication that there was not much difference in his findings and the State psychologist's finding of anti-social personality disorder was "damaging," and that the State psychologist's diagnosis under the DSM IV was wrong. These bold and conclusory statements are the sum-total of Maples's argument. Maples has failed to provide this Court with the name of, much less a report from, any other mental health expert that would contradict Shealy's findings.

In paragraph 145, Maples alleges that, "[u]pon information and belief, because of the superficiality of [Shealy's] evaluation, and the inadequate presentation of his testimony by Counsel, some of the jurors may have discounted [Shealy's] testimony." (Maples's petition at p. 61) This contention is the epitome of a speculative assertion. Maples fails to provide this Court with any information, much less identify its source, that indicates any juror discounted Shealy's

testimony. Paragraphs 143-145 contain only bare allegations with no factual basis. Therefore, they are summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In paragraph 146, Maples alleges that trial counsel failed to "obtain, prepare and question an expert [to prove that he] and the People of Alabama would be better served by [him receiving] a sentence of life imprisonment rather that death." (Maples's petition at p. 61) There is no requirement that trial counsel search the globe until a mental health expert that would testify as Maples indicates was found. Maples fails to name a mental health expert that would have testified he or anyone else would be better served by him being sentenced to life imprisonment without parole. The allegation in paragraph 146 is based purely on conjecture and speculation with no factual or legal basis; therefore, it is deficiently pleaded and is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In claim II.F., paragraphs 147 and 148 of Maples's petition, he alleges that trial counsel "failed to investigate [his] good behavior while in jail." (Maples's petition at p. 62) Maples contends that "witnesses would have testified to such good behavior." (Id.) Maples fails to identify these alleged witnesses or indicate what they would have testified about at trial. "A claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome." *Thomas*, 766 So. 2d at 893. Claim II.F. is deficiently pleaded and is not specific. "[N]o purpose would be served by any further proceedings" by the

Court; therefore, claim II.F. is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In claim II.G., paragraph 149 of Maples's petition, he alleges trial counsel were ineffective for failing to present to the jury information that he had such extreme nightmares while in jail awaiting trial he was prescribed an anti-depressant. Maples contends jurors should have been informed of his taking medication because, he says, trial counsel did not explain "his flat affect, which, upon information and belief, some jurors may have been negatively impacted by." (Maples's petition at p. 63) Paragraph 149 fails to indicate upon what information Maples relies, or identify any specific juror that was affected by his demeanor. Claim II.G. is deficiently pleaded and fails to establish that trial counsel's performance was deficient or cause him prejudice. "[N]o purpose would be served by any further proceedings" by the Court; therefore, claim II.F. is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP.*

In claim II.H., paragraph 150 of Maples's petition, he alleges trial counsel were ineffective for failing to discover that he had "suffered a number of traumatic head injuries," including falling off a 20 foot cliff onto rocks as a teenager and being hit with a baseball bat. (Maples's petition at p. 63) Maples contends that "documentary and other formation was available concerning these incidents". (Id.) Maples fails to provide the Court with any supporting documents, such as report from a doctor or hospital or an affidavit from any individual that would end any credibility to this claim. Paragraph 150 is deficiently pleaded because it contains only a bare allegation with no factual basis. "[N]o purpose would be served by any

further proceedings" by the Court; therefore, claim II.H. is summarily dismissed. Rules 32.3, 32.6(b) and 32.7(d), *ARCrP*.

In claim II.I., paragraphs 151-166 of Maples's petition, he alleges trial counsel were ineffective for failing to prevent or otherwise object to egregious instances of prosecutorial misconduct during the penalty phase of trial. (Maples's petition at p. 63)

Whether or not to object is often a matter of trial strategy and is presumed to be reasonable. *Lane v. State*, 708 So. 2d 206, 209 (Ala. Crim. App. 1997). Indeed, a "failure to object may suggest that the defense did not consider the comments to be particularly harmful." *Ex parte Payne*, 683 So. 2d 458, 465 (Ala. 1996).

The Alabama Court of Criminal Appeals has held that:

> "[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made." *Stringfellow v. State*, 485 So.2d 1238, 1243 (Ala. Crim. App. 1986). Even though there were several instances where counsel could have objected, "that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel." *Ex parte Lawley*, 512 So.2d 1370, 1373 (Ala. 1987). *O'Neal v. State*, 605 So.2d 1247, 1250 (Ala. Crim. App. 1992)."
>
> *Thomas*, 766 So. 2d at 876.
>
> "'In judging a prosecutor's closing argument, the standard is whether the argument so infected the trial with unfairness as to make the resulting

> conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986)(quoting, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

Hyde v. State, 778 So. 2d 199, 228 (Ala. Crim. App. 1998), aff'd, *Ex parte Hyde*, 778 So. 2d 237 (Ala. 2000).

> "A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." *Roberts v. State*, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997).

Melson v. State, 775 So. 2d 857, 884 (Ala. Crim. App. 1999), aff'd, *Ex parte Melson*, 775 So. 2d 904 (Ala. 2000). With these principles in mind, this Court will address each alleged instance of prosecutorial misconduct.

In paragraph 152, Maples alleges that trial counsel "failed to object to the State telling the jury what they should think." (Maples's petition at p. 64) Maples's only reference to the record are two short quotes from the State's penalty phase closing argument.

The first instance quoted by Maples occurred at R. 3292. In pertinent part, the prosecutor argued that:

> *There is no question that [Maples] made that phone call, I don't think, and I don't* think *it is in your minds either.* You can clearly tell it's [Maples'] voice on the tape.

The italicized portion of the above quote is the basis of Maples's allegation. When read in context, it is obvious that the prosecutor was making a legitimate comment on evidence that had been admitted at trial,

not telling the jury what they should think. "Counsel for both the [S]tate and the defendant are allowed wide latitude in drawing their deductions from the evidence in arguments to the jury." *Thomas*, 766 So. 2d at 902.

Moreover, the Court of Criminal Appeals reviewed the underlying substantive issue on direct appeal and held:

> Regarding the prosecutor's comment about the telephone call, there was evidence that [Maples] made a 911 telephone call and identified himself as "Jamie Dobbs." However, in his videotaped confession, [Maples] denied making that call. "During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference." *Rutledge v. State*, 523 So. 2d 1087, 110 (Ala. Crim. App. 1987) (citation omitted), rev'd on other grounds, 523 So. 2d 1118 (Ala. 1988).

Maples, 758 So. 2d at 56.

Because the prosecutor's argument was proper, trial counsel had no basis to object; therefore, their performance was not deficient. To establish ineffective assistance of counsel, "[f]irst, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Based on the Court of Criminal Appeals's holding, Maples is unable to prove ineffective assistance of counsel under the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 152 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 153, Maples alleges that trial counsel were ineffective for failing to object to the State's argument that "[his] death was more useful than a life in prison, because of the alleged deterrent effect of the death penalty." (Maples's petition at p. 65) Maples raised the underlying substantive issue on direct appeal.

The Court of Criminal Appeals held:

> This argument is simply without merit. In capital cases, "the prosecutor and defense counsel shall be given an opportunity to argue for and against respectively the imposition of the death penalty in the individual case." *Beck v., State*, 396 So. 2d 645, 663 (Ala. 1980), rev'd on other grounds, 485 So. 2d 1201 (Ala. 1984).

Maples, 758 So. 2d at 57.

Because the underlying substantive claim is without merit, trial counsel cannot be ineffective for failing to object. *Williams*, 783 So. 2d at 133. Based on the Court of Criminal Appeals's holding, Maples is unable to establish either the deficiency prong or the prejudice prong of the *Strickland* test. The allegation in paragraph 153 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 154, Maples alleges that trial counsel were ineffective for not objecting to "the State's improper comment on [his] failure to provide for specific witnesses." (Maples's petition at p. 65) The prosecutor's comment cited by Maples was in response to testimony that he provided assistance to the Decatur Police Department. Maples raised the underlying substantive issue on direct appeal.

The Court of Criminal Appeals held that:

> [a]lthough generally a party may not comment on the other party's failure to call a witness who is available to both sides, we do not find that the prosecutor's comment in this instance was improper. Because the defense counsel offered evidence of [Maples's] involvement with Decatur police officers in arresting drug dealers, the prosecutor had a right to attempt to disprove the existence of the mitigating circumstance under § 13A-5-45(g), Ala. Code 1975. Moreover, the prosecutor could legitimately comment on the defense's evidence. *Stewart v. State*, 601 So. 2d 491, 506 (Ala. Crim. App.), opinion extended after remand, 659 So. 2d 120 (Ala. Crim. App. 1992), rev'd on other grounds, 659 So. 2d 122 (Ala. 1993).

Maples, 758 So. 2d at 55.

Because the Court of Criminal Appeals found that the State's comment was not improper, trial counsel had no obligation, or basis, to object. Based on the Court of Criminal Appeals's holding, Maples is unable to establish either the deficiency prong or the prejudice prong of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 154 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 155, Maples alleges that trial counsel were ineffective for not objecting to "the improper invocation by the prosecutor of the victim's family's views on the appropriate punishment." (Maples's petition at p. 66) Maples raised the underlying substantive issue on direct appeal.

The Court of Criminal Appeals found that the State's argument was in response to trial counsel's closing argument that life without parole would be a

harsher punishment than death. After reviewing the prosecutor's argument, the Court of Criminal Appeals held that:

> The foregoing argument did not refer to the victim's family's opinion regarding what sentence [Maples] should receive. ... The prosecutor did not argue or imply that Mr. Terry wanted [Maples] to be sentenced to death; rather he argued that Mr. Terry would much rather have his son be alive and in prison than dead. The prosecutor's argument and example was in response to the defense counsel's lengthy argument that [Maples] did not deserve death and that life imprisonment without parole was a harsher punishment than death.

Maples, 758 So. 2d at 57.

Based on the Court of Criminal Appeals's holding, Maples is unable to establish either the deficiency prong or the prejudice prong of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 155 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraphs 156 and 157, Maples alleges that trial counsel were ineffective for not objecting to the State misstating the law. Maples contends that "the State erroneously told the jury that they could consider the "particularly violent nature of these murders" as going to the aggravating circumstances of the homicides." (Maples's petition at p. 67).

In addressing the underlying substantive issue on direct appeal, the Court of Criminal Appeals held:

> Although the prosecutor did urge the jury to consider the violent nature of the murders, [Maples] was not prejudiced by this remark. The trial court

> instructed the jury that the only aggravating circumstance it was to consider in this case was that the capital offenses was committed while [Maples] was engaged in the commission of a robbery. It further instructed the jury that the State had to prove the aggravating circumstance beyond a reasonable doubt, and the jury was to consider evidence relating only to the one aggravating factor it had been instructed by the court to consider. We presume that the jury followed the trial court's instruction. Therefore, we find no error in this regard.

Maples, 758 So. 2d 55. (citation omitted)

Because the Court of Criminal Appeals found no prejudice or error in the underlying substantive issue, Maples is unable to establish the prejudice prong of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraphs 156 and 157 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7 d), *ARCrP*.

In paragraph 158, Maples alleges that trial counsel were ineffective for failing to object to the State's improper rebuttal of trial counsel's closing argument regarding mitigating circumstances. In the penalty phase closing argument, trial counsel argued that Maples suffered from a personality disorder that caused him to "snap and murder". The prosecutor rebutted this contention by arguing that Maples had not pleaded guilty by reason of insanity and that Maples had said that he did not do the murders. (Maples's petition at p. 67)

In addressing the underlying substantive issue on direct appeal, the Court of Criminal Appeals held:

> After thoroughly reviewing the prosecutor's [penalty phase] closing and rebuttal arguments, we find that the prosecutor's comments regarding the mitigation evidence of ... mental impairment [was] made in response to defense counsel's argument that the jury should consider ... the fact that [Maples], according to the psychologist's testimony, suffered from diminished capacity, resulting from his consumption of alcohol and drugs at the time of the murders, as [a] mitigating circumstanc[e]. Pursuant to § 13A-5-45(g), Ala. Code 1975, the State has the burden of refuting mitigating circumstances offered by the defense. ... Moreover, the trial court thoroughly instructed the jury to consider ... mental impairment as [a] mitigating circumstanc[e] and to weigh all of the mitigating circumstances against the aggravating circumstances.

Maples, 758 So. 2d at 54.

Because the Court of Criminal Appeals held that the prosecutor's argument was proper, Maples is unable to establish either deficient performance or prejudice under the *Strickland* test regarding trial counsel's failure to object. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2006. The allegation in paragraph 158 is without merit; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 159, Maples alleges that trial counsel were ineffective for failing to object to the prosecutor's argument that Maples's age should not be considered as a mitigating circumstance. This allegation concerns the prosecutor telling the jury that, if Maples were 14

years old, his age would be a mitigating circumstance. Maples is attempting to use the prosecutor's example to infer that he misstated the law.

On direct appeal, the Court of Criminal Appeals held that "the trial court thoroughly instructed the jury to consider [Maples's] age ... and to weigh all of the mitigating circumstances against the aggravating circumstances." *Maples*, 758 So. 2d at 54. Jurors are presumed to follow instructions. *Id.*

Based on the Court of Criminal Appeals's holding, Maples is unable to establish either the deficiency requirement or the prejudice requirement of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 159 is without merit; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 160, Maples alleges that trial counsel were ineffective for not objecting to the prosecutor implying that trial counsel would not be truthful in presenting mitigating circumstances. This inference arose, according to Maples, when the prosecutor stated that: "the statutory mitigating factor [the lack of a criminal history]...that we admit *because it is the truth*" (R. 3253) (emphasis in Maples's petition) The prosecution made this statement during its first penalty phase closing argument. The prosecutor's comment was in anticipation of what trial counsel would argue during their closing argument and, in fact, trial counsel extensively argued for a recommendation of life without parole based on Maples's lack of criminal history. (R. 3271-3273)

Maples has provided the Court with no evidence that any member of the jury took the prosecutor's argument as a comment on the veracity of defense

counsel. The allegation in paragraph 160 is based on pure speculation and conjecture with no factual support; therefore, it is without merit and is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 161, Maples alleges trial counsel were ineffective for failing to object to the prosecutor's alleged misstatement of the law. Maples contends that the prosecutor argued that "*mitigating* circumstances would never outweigh aggravating *circumstances*." (Maples's petition at p. 69) (Emphasis in petition) Maples has misstated the prosecutor's argument.

In his first penalty phase closing, the prosecutor concluded by saying:

> Again, I say to you *in this case* after you have heard all the arguments and heard the Judge's charge, whatever mitigating circumstances you find to be present *in this case* will never outweigh the aggravating circumstance you heard about *in this case* for the last week.

(R. 3255)(Emphasis added)

The prosecutor was obviously arguing that the one aggravating circumstance (that the murder was committed during a robbery) outweighed the statutory and nonstatutory mitigating circumstances *in this particular case*. This is entirely proper. *Beck v. State*, 369 So. 2d 645 (Ala. 1980), rev'd on other grounds, 485 So. 2d 1201 (Ala. 1984).

Maples fails to plead and prove that trial counsel were deficient or that he was prejudiced for their failure to object to the State's proper comment. The allegation in paragraph 161 is without merit; therefore, it is dismissed. Rule 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 162, Maples alleges that trial counsel were ineffective for not objecting to "the prosecutor [] improperly [telling] the jury that, "[y]ou all said you were in favor of the death penalty" and that '[i]f you hadn't said that, you wouldn't be on the jury.' (R. at 3306)" (Maples's petition at pp. 69-70) Maples contends these comments by the State inferred to the jury that favoring a sentence of death was a prerequisite for sitting on the jury.

The Court of Criminal Appeals addressed the underlying substantive issue on direct appeal and held that the prosecution "was simply arguing that the jurors had to be able to consider death as punishment to sit on the jury in a capital case. (R. 3306-7) Thus, the prosecutor's comments in this regard were not erroneous." *Maples*, 758 So. 2d at 58.

Because the Court of Criminal Appeals held that the prosecutor's argument was proper, Maples is unable to establish either deficient performance or prejudice under the *Strickland* test regarding trial counsel's failure to object. *Williams*, 783 So. 2d at 133. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2006. The allegation in paragraph 162 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 163, Maples alleges that trial counsel were ineffective for failing to "object to the State's accusations that [he] was a liar." (Maples's petition at p. 70)

The Court of Criminal Appeals reviewed the prosecutor's argument on direct appeal and held:

> The [prosecutor's argument] was proper argument by the prosecutor regarding the inconsistencies in [Maples's] videotaped confession and the psychologist's testimony. The psychologist testified that [Maples] told him he was intoxicated and on drugs on the night of the murders, but [Maples] denied that in his videotaped confession.

Maples, 758 So. 2d at 56.

Because the prosecution's argument was proper, trial counsel had no basis to object and Maples is unable to prove deficient or prejudiced performance on behalf of his trial counsel as required by *Strickland*. The allegation in paragraph 163 is without merit; therefore, it is summarily dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 164, Maples alleges that trial counsel were ineffective for "failing to object to the State's improper comments on [his] decision not to testify." (Maples's petition at p. 70) The cited portions of the prosecutor's argument in Maples's petition are the same as those reviewed by the Court of Criminal Appeals on direct appeal.

In finding no plain error in the prosecutor's arguments, the Court of Criminal Appeals held:

> "Remorse is a proper subject of comment during sentencing.' *Travis v. State*, ___ So. 2d ___, ___ (Ala. Crim. App. 1997). ... Counsel is "allowed wide latitude in drawing reasonable inferences from the evidence in closing arguments.'" *Jones v. State*, 600 so. 2d 424, 425 (Ala. Crim. App. 1992) (quoting *Cross v. State*, 536 So. 2d 155, 160 (Ala. Crim. App. 1988)). Accordingly, the prosecutor's statements do not rise to the level of plain error.

Maples, 758 So. 2d at 22.

Because the Court of Criminal Appeals found no plain error in the underlying substantive issue, Maples is unable to establish the prejudice part of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 164 is without merit; therefore, it is summarily dismissed. 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 165, Maples alleges that trial counsel were ineffective for "failing to object to the State's improper comments on [his] flat affect and courtroom demeanor." (Maples's petition at p. 71) Maples raised the underlying substantive issue on direct appeal. The Court of Criminal Appeals found no error, holding that "[t]he prosecutor's comments were merely in response to defense counsel's argument." *Maples*, 758 So. 2d at 56.

Because the prosecutor's comments were proper, trial counsel had no basis to object and Maples cannot prove trial counsel's failure to object resulted in deficient or prejudicial performance under the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 165 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 166 of Maples's petition, he contends that trial counsel's failure to object to the allegations of prosecutorial misconduct in claim II.I., individually and cumulatively, caused him prejudice. For the reasons stated above, however, the State has demonstrated that Maples has failed to prove deficient performance or prejudice regarding trial counsel's failure to object to any allegation of prosecutorial misconduct that would show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result to the

proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The allegation in paragraph 166 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*; *Nicks v. State*, 1999 WL 784122, at *7 (Ala. Crim. App. Oct. 1, 1999) (holding that where no single allegation in a Rule 32 petition warranted relief, the Court of Criminal Appeals would not consider the cumulative effect).

In claim II.J., paragraph 167 of Maples's petition, he alleges that trial counsel were ineffective for failing to object to the trial court not instructing the jury that they "could not draw any adverse inference from [his] failure to testify at either phase of the trial." (Maples's petition at p. 72) Maples contends that "upon information and belief, [his] silence at trial may have adversely affected the jurors' perception of him." (Id. at 73) Maples fails to identify what information he relies on or which specific juror or jurors were affected by his failure to testify.

Maples's allegation that his failure to testify *may have* adversely affected the jurors' perception of him is nothing more that a bare, speculative allegation containing no facts upon which relief could be granted. The allegation in paragraph 167 is deficiently pleaded and is not specific; therefore, it is summarily dismissed by the Court. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

Moreover, claim II.J. is without merit. The trial court instructed the jury during its guilt phase charge as follows:

> Ladies and gentlemen of the jury, the constitution of the United States of America and the Constitution of the State of Alabama both grant a defendant the right not to testify if he so chooses.

> The defendant in this case has exercised this constitutional right and has not testified live at this trial. Therefore, *I charge you that you may not use the defendant's choice not to testify to make any inferences or presumptions as to the defendants' guilt or innocence.*

(R. 2983). (Emphasis added).

A claim that is refuted by the record on direct appeal is meritless. *Gibby v. State*, 753 So. 2d 1206, 1207-1208 (Ala. Crim. App. 1999). Because this allegation is without merit, Maples is unable to establish that trial counsel's performance was deficient or prejudicial. In addition to the reasons stated above, the allegation in paragraph 167 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim II.K., paragraphs 168-170 of Maples's petition, he alleges that trial counsel were ineffective for failing to "recognize and adequately object to trial error" during the sentencing phase of trial. (Maples's petition at p. 73)

In paragraph 169, Maples alleges that trial counsel were ineffective or failing to object to the trial court "impermissibly instructing the jury to find that an aggravating circumstance existed in [his] case." (Id.) Maples raised the underlying substantive issue on direct appeal.

The Court of Criminal Appeals found no plain error in the trial court's instruction, concluding that "the trial court correctly instructed the jury on this issue, and [Maples's] claim is without merit." *Maple*, 758 So. 2d at 80. Because the Court of Criminal Appeals found no plain error in the underlying substantive issue, Maples is unable to establish the prejudice part of the

Strickland test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 169 is without merit; therefore, it is dismissed. 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In paragraph 170, Maples alleges that trial counsel were ineffective or failing to "object to the court improperly sentencing [him] to death after rejecting evidence of three statutory mitigating circumstances." (Maples's petition at p. 74) Maples raised the underlying substantive issue on direct appeal.

In finding no plain error, the Court of Criminal Appeals held:

> The trial court allowed [Maples] to present all of the mitigating evidence he wanted to present, and its sentencing order clearly indicates that it considered all of the mitigating evidence [Maples] presented. Although the trial court did not give much weight to the nonstatutory mitigating evidence, it did find that several of the circumstances mitigated the offense. ... Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance. ... [The trial court] did not improperly sentence [Maples] to death.

Maples, 758 So. 2d at 32-33. (citations omitted)

Because the Court of Criminal Appeals found no plain error in the underlying substantive issue, Maples is unable to satisfy the prejudice part of the *Strickland* test. *Williams*, 783 So. 2d at 133. The allegation in paragraph 170 is without merit; therefore, it is dismissed. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

In claim III.A., paragraphs 171-178 of Maples's petition, he alleges that trial counsel were ineffective for "using different and contradictory strategies about [his] intoxication during the guilt and penalty phase of [his] trial." (Maples's petition at p. 75) Specifically, Maples contends that the State "introduced substantial evidence" that he was intoxicated shortly before the murders and that he used crack and crystal methamphetamine on the night of the murders and, "[i]n stark contrast," trial counsel attempted to establish that Maples was not intoxicated or under the influence of drugs. Maples contends that, during the penalty phase, trial counsel "employed a strategy directly contradictory to his guilt phase strategy," by attempting to establish that alcohol was the cause of the murders.

During the guilt phase of trial, Maples's confession to police was admitted into evidence. In it, Maples said he was not intoxicated at the time he committed the murders. On direct appeal, the Criminal Court of Appeals held that:

> [a]lthough there was some testimony that [Maples] had ingested alcohol several hours before the murders occurred, there was no testimony that he was intoxicated at the time of the murders. Also, there was no evidence that [Maples] had ingested drugs before the murders.

Maples, 758 So. 2d at 24.

During the penalty phase of trial, Dr. Shealy testified concerning statements Maples made during their interview. According to Shealy, Maples said that he was intoxicated at the time he committed the murders. The Court of Criminal Appeals found that:

> [Shealy] testified that [Maples] told him he was intoxicated and on drugs on the night of the murders, but [Maples] denied that on his videotaped confession.

Maples, 758 So. 2d at 56.

In *Strickland*, the Supreme Court stated that:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.

466 U.S. at 691, 104 S. Ct. at 2066.

In *Bui v. State*, 717 So. 2d 6 (Ala. Crim. App. 1997), the petitioner contended that his trial counsel were ineffective during the guilt phase of this trial for presenting allegedly inconsistent defenses. The Court of Criminal Appeals held that "an attorney's presentation of somewhat inconsistent alternative defenses in not necessarily defective performance." *Id.* at 21.

The *Bui* Court went on to indicate that:

> We are loathe to find fault with the appellant's trial counsel for attempting to make the most of the unfavorable facts of a case he was presented with and for advocating as many plausible explanations for the appellant's actions as the evidence might support, even where those explanations may not have been entirely consistent.

Id.

During the guilt phase, trial counsel's strategy was to attack the elements of the indictment that raised the offenses from intentional murders to capital murders. Trial counsel attempted to show that the murders were not committed pursuant to a common plan or scheme as

alleged in Count I of the indictment by arguing that the lapse of time between the discovery of Terry's body and the discovery of Robinson's body established a reasonable doubt that someone else could have murdered Robinson. Trial counsel attempted to show that Maples took Terry's car as a mere afterthought and not as part of a plan to rob him as alleged in Count II of the indictment.

Although Maples argues that trial counsel's guilt and penalty "strategies fell far below the standard of reasonable performance and demonstrated such a failure to know or understand the law that it cannot be considered permissible trail strategy", he fails to plead and prove, given the overwhelming evidence against him, "that no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.3d at 1315. Maples has failed to carry his burden of proof and show that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2968. Maples has failed to establish that trial counsel's performance was deficient or caused him to be prejudiced. The allegations in claim III.A. are without merit; therefore, claim III.A. is dismissed in its entirety. Rules 32.3, 32.6(b), and 32.7(d), *ARCrP*.

CONCLUSION

For the reasons stated above, Maples has failed to carry his burden of pleading any meritorious claim that, if true, would show that "[trial] counsel's conduct [did not] fall[] within the wide range of reasonable professional assistance". *Strickland*, 466 U.S. at 689, 104 S. Ct. 2065. Therefore, Maples's post-conviction petition for relief filed pursuant to Rule 32, *ARCrP* is hereby DENIED.

The Petitioner has 42 days from the date of this order to appeal.

ORDERED this the 22nd day of May ~~2001~~ 2003.

s/ Glenn Thompson
Glenn E. Thompson, Circuit Judge,
Eighth Judicial Circuit

CC: Jaasi Munanka, Counsel for Petitioner
Clara Ingen-Housz, Counsel for Petitioner
John G. Butler, Counsel for Petitioner
Jon B. Hayden, Counsel for the State

FILED
2003 AUG 29 AM 8: 37
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	*	
	*	
Petitioner,	*	
	*	
vs.	*	
	*	CV-03-B-2399-NE
DONAL CAMPBELL,	*	
Commissioner of the	*	
Alabama Department of	*	
Corrections,	*	
	*	
Respondent.	*	

PETITION FOR WRIT OF HABEAS CORPUS BY PRISONER IN STATE CUSTODY UNDER DEATH SENTENCE

Petitioner Cory Maples, now incarcerated at Holman State Prison in Atmore, Alabama, respectfully petitions this Court for relief from his unconstitutionally obtained conviction and death sentence.

1. Mr. Maples makes application to this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

2. On October 30, 1997, Mr. Maples was convicted of the capital murder of Stacy Terry and Barry Robinson in violation of Ala. Code § 13A-5-40(10) (1994) (murder of two persons by one act or pursuant to one scheme or course of conduct) and Ala. Code § 13A-5-40(2) (1994) (murder during a robbery), in the Morgan County Circuit Court, Judge Glenn Thompson presiding. On the following day, October 31, 1997, the jury recommended the death penalty by a vote of 10 to 2.

3. On November 21, 1997, the trial court, finding one aggravating factor and one statutory mitigating factor, sentenced Mr. Maples to death.

4. Mr. Maples's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on March 26, 1999. Maples v. State, 758 So. 2d 1 (Ala. Crim. App. 1999).

5. The Alabama Supreme Court affirmed on December 10, 1999. Ex parte Maples, 758 So. 2d 81 (Ala. 1999).

6. On October 2, 2000, the United States Supreme Court denied Mr. Maples's petition for writ of certiorari. Maples v. Alabama, 531 U.S. 830 (2000).

7. On August 1, 2001, Petitioner, through counsel, filed a petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure requesting post-conviction relief on eleven enumerated grounds and requesting an evidentiary hearing on the merits of the claims. Petitioner was represented pro bono publico, by Ms. Clara Ingen-Housz and Mr. Jaasi Munanka of the New York law firm of Sullivan & Cromwell. Mr. John Butler of Huntsville, Alabama appeared as local counsel for the sole purpose of allowing Ms. Ingen-

Housz and Mr. Munanka to appear pro hac vice in the Circuit Court of Morgan County, Alabama.

8. On September 28, 2001, Respondent State of Alabama filed an answer and moved to dismiss the Rule 32 Petition for post-conviction relief. On December 27, 2001, Judge Glenn E. Thompson of the Morgan County Circuit Court denied Respondent's motion to dismiss finding that the Petition was sufficiently pled. Copies of the order were mailed to Ms. Ingen-Housz, Mr. Munanka and Mr. Butler.

9. Thereafter, Ms. Ingen-Housz left the firm of Sullivan & Cromwell to work as an attorney in Belgium. Mr. Munanka also left Sullivan & Cromwell and is currently clerking for a federal district court judge in the Southern District of New York. However, Sullivan & Cromwell attorneys continued in the pro bono representation of Mr. Maples. Several additional attorneys from Sullivan & Cromwell, including undersigned attorney Marc De Leeuw, assumed responsibility for the matter. Since Judge Thompson had ruled that the matter had been sufficiently pled, Mr. De Leeuw and other attorneys at Sullivan & Cromwell continued to prepare for the anticipated evidentiary hearing.

10. On May 22, 2003, Judge Thompson entered an Order denying Mr. Maples' Rule 32 petition for post-conviction relief. Copies of this order were mailed to Ms. Ingen-Housz and Mr. Munanka at Sullivan & Cromwell and also to Mr. Butler. By that time, Ms. Ingen-Housz and Mr. Munanka had left the firm of Sullivan & Cromwell and the copies sent to them were returned to the clerk of the Morgan County Circuit Court. The copy sent to Mr. Butler was received by him. However, since Mr. Butler's sole involvement in

the case had been to file his appearance, he assumed that counsel at Sullivan & Cromwell had received the May 22, 2003 order based on the notation that copies had been sent to Ms. Ingen-Housz and Mr. Munanka. As a result, Mr. Maple's current attorneys at Sullivan & Cromwell, including undersigned, Marc De Leeuw remained unaware that the Order of Judge Thompson, denying post-conviction relief, had been issued.

11. On August 13, 2003, Mrs. Lisa Maples, Cory Maples' mother, called Sullivan & Cromwell to inform Cory's current attorneys that Cory had received a letter from John Hayden, the Attorney General of Alabama. The letter apparently stated that the Circuit Court of Morgan County had denied Petitioner's Rule 32 petition on May 22, 2003, that Petitioner's right to appeal that decision had expired May 22, 2003 and that his deadline for filing a federal habeas corpus petition was September 9, 2003. Cory Maples was the only person who received this letter.

12. On August 22, 2003, a clerk of the Circuit County Court of Morgan County confirmed to Mr. Maples' current attorneys at Sullivan & Cromwell that the two copies of the May 22, 2003 Order mailed to Ms. Ingen-Housz and Mr. Munanka had been returned to that Court.

13. On August 26, 2003, in light of the foregoing, undersigned counsel and Mr. Butler filed a Motion to Reissue the Court's May 22, 2003 Order denying Petitioner's Rule 32 Petition with the Circuit Court of Morgan County, Alabama. That motion is currently pending. If it is granted, undersigned counsel, on behalf of Mr. Maples, would intend to appeal the matter to the Alabama Court of Criminal Appeals and, if necessary, to the Alabama Supreme Court.

* * *

Respectfully submitted,

s/ Mark De Leeuw
Mark De Leeuw*
125 Broad Street, 32nd Floor
New York, NY 10004
(212) 558-4217

s/ Gary A. Alexion
Gary A. Alexion
c/o The Legal Aid Society
Capital Division
1 Battery Park Place, 22nd Floor
New York, NY 10004
(212) 577-3427

John G. Butler*
MacDaniel & MacDaniel
223 East Side Square
Huntsville, AL 35802
(256) 534-3018

COUNSEL FOR MR. MAPLES

Dated: August 28, 2003

---

* Mr. Butler is admitted to the bar of the United States District Court for the Northern District of Alabama. Mr. DeLeewu and Mr. Alexion are admitted to the bar of the State of New York and one or both of us will apply to appear pro hac vice on this matter within ten days of this filing pursuant to Local Rule 83.1(b).

FILED
03 SEP 12 AM 9:27
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CORY R. MAPLES, Petitioner,	)	
vs.	)	Case No. CV-03-B-2399-NE
DONAL CAMPBELL, Commissioner, Alabama Department of Corrections, Respondent.	)	

MOTION FOR ADMISSION *PRO HAC VICE* OF FELICE DUFFY

Felice Duffy respectfully moves this Court pursuant to Local Rule 83.1 for admission *pro hac vice* as counsel for Petitioner in the above-captioned action. In support of this Motion, the undersigned sets forth and affirms the following:

1. I am associated with the law firm Sullivan & Cromwell in New York, New York and am *pro bono* counsel for Petitioner Cory R. Maples. I have worked on Mr. Maple's case since October 14, 2002.

2. I am a member in good standing of the Bar of the United States District Courts for the Eastern and Southern Districts of New York and the District of Connecticut and the Bar of the States of New York and Connecticut. Attached as Exhibit A is a certificate of good standing from the Bar of the State of New York.

3. I am a graduate of the Quinnipiac University School of Law. From 2000-2002, I served as a judicial law clerk to the Honorable Stefan R. Underhill, United States District Court Judge for the District of Connecticut.

4. I am not currently, nor have I ever been, suspended or disbarred in any court. There are no grievances or criminal matters pending against me.

5. I consent to this Court exercising disciplinary jurisdiction over me with respect to my conduct in this action. I have read and am familiar with the Alabama Rules of Professional Conduct and the Local Rules of this Court.

WHEREFORE, the undersigned respectfully requests that she be admitted *pro hac vice* in this action.

Dated: September 11, 2003

s/ Felice M. Duffy
Felice Duffy
125 Broad Street
New York, New York 10004
(212) 558-4000

* * *

FILED
03 SEP 12 AM 9:27
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CORY R. MAPLES, Petitioner, vs. DONAL CAMPBELL, Commissioner, Alabama Department of Corrections, Respondent.	)	Case No. CV-03-B-2399-NE

MOTION FOR ADMISSION *PRO HAC VICE* OF MARC DE LEEUW

Marc De Leeuw respectfully moves this Court pursuant to Local Rule 83.1 for admission *pro hoc vice* as counsel for Petitioner in the above-captioned action. In support of this Motion, the undersigned sets forth and affirms the following:

1. I am a member of the law firm Sullivan & Cromwell LLP in New York, New York and am *pro bono* counsel for Petitioner Cory R. Maples. I have worked on Mr. Maple's case for over a year.

2. I am a member in good standing of the Bar of the United States District Courts for the Eastern and Southern Districts of New York and the District of New Jersey, the United States Courts of Appeals for the Second and Eleventh Circuits, the United States Supreme Court and the Bar of the States of New York and New Jersey. Attached as Exhibit A is a certificate of good standing from the Bar of the State of New York.

3. I am a graduate of Columbia Law School.

4. I am not currently, nor have I ever been, suspended or disbarred in any court. There are no grievances or criminal matters pending against me.

5. I consent to this Court exercising disciplinary jurisdiction over me with respect to my conduct in this action. I have read and am familiar with the Alabama Rules of Professional Conduct and the Local Rules of this Court.

WHEREFORE, the undersigned respectfully requests that he be admitted *pro hac vice* in this action.

Dated: September 11, 2003

s/ Mark De Leeuw

Mark De Leeuw
125 Broad Street
New York, New York 10004
(212) 558-4000

* * *

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

Ex Parte Cory R. Maples

CORY R. MAPLES,
(Petitioner)

v. Case No. CC-95-842.60

STATE OF ALABAMA
(Respondent)

PETITION FOR A WRIT OF MANDAMUS

Comes now Cory R. Maples and petitions the above named Court for a writ of mandamus to Glenn E. Thompson of the Morgan County, Alabama Circuit Court and shows the following in support of this petition.

* * *

WHEREFORE, the premises considered, Petitioner prays that the Court grant the petition and order that an answer to the petition be filed by respondent.

I certify that I have this day served copies of this petition on the respondent judge and all other parties to the action in the trial court.

s/ John G. Butler, Jr.

John G. Butler, Jr.
223 East Side Square
Huntsville, Al 35801
Local Counsel for
Petitioner Corey Maples

Marc De Leeuw
Felice Duffy
Erious Johnson
125 Broad Street
32nd Floor
New York, NY 10004
212-558-4906

Of Counsel for
Petitioner Corey Maples

No. CR-03-0021

In The SUPREME COURT OF ALABAMA

EX PARTE CORY R. MAPLES

IN RE:

Cory R. MAPLES

vs.

STATE OF ALABAMA

CORY R. MAPLES'S PETITION FOR WRIT OF MANDAMUS TO THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

* * *

Regardless of who, other than Mr. Maples, received notice that Mr. Maples's Rule 32 Petition had been dismissed, the only fact that matters is that Mr. Maples was denied his right to appeal that adverse decision, through no fault of his own. To deny him the relief he now seeks would run counter to constitutionally guaranteed due process and the established precedents of Alabama caselaw.

/s/ Marc De Leeuw
Marc De Leeuw
125 Broad Street
32nd Floor
New York, NY 10004
212-558-4906

Of Counsel for Petitioner Cory Maples

John G. Butler, Jr.
223 East Side Square
Huntsville, Al 35801

Local Counsel for Petitioner Cory Maples

FILED
04 NOV -9 12 AM 11:40
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CORY R. MAPLES,
Petitioner,

vs. CASE NO. CV 03-B-2399-NE

DONAL CAMPBELL,
Commissioner of the Alabama Department of Corrections,
Respondent.

LEAVE TO FILE EXHIBITS

Comes now Petitioner, Cory R. Maples, by and through his attorney, John G. Butler, Jr. and files leave to file exhibits, as grounds would show as follows:

1. The Petitioner inadvertently left out his exhibits to his Petition filed on October 29, 2004.
2. The Exhibits are attached hereto.

WHEREFORE, ABOVE PREMISES CONSIDERED, the Petitioner respectfully requests this Honorable Court to grant his request.

Respectfully submitted, this 8th day of November, 2004.

s/ John G. Butler, Jr.
JOHN G. BUTLER, JR.
Attorney for Petitioner
223 East Side Square
Huntsville, AL 35801

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy, first class mail, postage paid, to:

Assistant Attorney General Jon B. Hayden
Alabama Attorney General's Officer
11 South Union Street
Montgomery, AL 36130

Done this 8th day of November, 2004.

s/ John G. Butler, Jr.
JOHN G. BUTLER, JR.

* * *

No. 04-

IN THE
SUPREME COURT OF THE UNITED STATES

CORY R. MAPLES,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

* * *

CONCLUSION

For the reasons set forth above, Petitioner Cory R. Maples respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MARC DE LEEUW
125 Broad Street
32nd Floor
New York, NY 10004

GARY A. ALEXION
C/O THE LEGAL AID SOCIETY
Capital Division
199 Water Street
New York, NY 10038

JOHN G. BUTLER, JR.
223 East Side Square
Huntsville, AL 35801

JOSEPH J. FRANK
Counsel of Record
KATHY E. BREWER
RACHEL SULLIVAN
EVELYN BALTODANO-SHEEHAN
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10019
(212) 819-8222

FELICE M. DUFFY
ZELDES, NEEDLES & COOPER
1000 Lafayette Blvd.
Bridgeport, CT 06604

Counsel for Petitioner

FILED
2005 Mar-09 AM 10:47
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	)	
	)	
Petitioner,	)	
	)	CIVIL ACTION NO. 03-
v.	)	B-2399-NE
	)	
DONAL CAMPBELL, Commissioner, Alabama Department of Corrections,	)	
	)	
Defendants.	)	

ORDER

This is a second[1] petition for a writ of habeas corpus filed on behalf of Cory R. Maples who has been convicted of capital murder and sentenced to death.

---

1 The first petition was filed August 29, 2003. On December 3, 2003 petitioner's motion for stay was granted. On December 16, 2004 petitioner filed a Notice of filing Writ of Certiorari with the United States Supreme Court. On February 22, 2005 the Supreme Court denied the petition for writ of certiorari. The second petition was filed on March 4, 2005.

In order to provide for the expeditious and effective processing of this petition the following order is hereby made:

I. On or before April 15, 2005, 2005 counsel for the petitioner, as an officer of this court, shall certify to the court that counsel has, before or after the date of this order, met with the petitioner, either in person or by telephone, and that:

A. counsel has advised petitioner that the court will not accept successive petitions and that if there are grounds existing at this time for a petition for the writ of habeas corpus such grounds must be forthwith stated in appropriate pleadings and any failure to do so will constitute a waiver of any omitted grounds;

B. counsel has discussed the provisions of the statutes and rules governing habeas corpus petitions by state prisoners in the United States District Courts; and,

C. counsel has explored with the petitioner as fully as possible all potential grounds for relief including, but not limited to, the following:

1. The right to remain silent and not to incriminate oneself was violated;
2. *Miranda* warnings were not given or were not given properly;
3. Government agents or informers deliberately elicited incriminating statements from petitioner;
4. That any line-up, show-up, photo array or in-court identification was violative of

the Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution;

5. Any confession was not voluntary;
6. Petitioner was not mentally or physically competent to stand trial;
7. Petitioner was prejudiced by pre-trial or trial publicity;
8. The petitioner appeared before members of the jury in jail clothing;
9. The grand or petit juries were selected in an unconstitutional manner;
10. Petitioner was denied the right to a speedy trial;
11. Petitioner was denied the right to a public trial;
12. Petitioner was twice placed in jeopardy;
13. Petitioner was not afforded the effective assistance of counsel either at trial or on appeal;
14. Petitioner was denied the right to confront and cross-examine the witnesses against him;
15. Petitioner was denied the right to compulsory process;
16. The evidence was so lacking that no rational trier of fact could have found the petitioner guilty beyond a reasonable doubt;
17. The court's instructions to the jury deprived the petitioner of the presumption that petitioner was not guilty;

18. On a second sentencing the petitioner was punished more severely than on the first;
19. The sentence was disproportionate to the crime for which petitioner was convicted;
20. The required aggravating circumstances were not present in petitioner's case;
21. Mitigating circumstances were either not presented to the sentencing authority or were not properly considered;
22. The punishment imposed was the product of racial discrimination;
23. Potential jurors were excluded from the trial of petitioner's cases in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny;
24. The prosecution used peremptory challenges to remove blacks from the jury for improper reasons;
25. The prosecutor made improper arguments to the jury; and,
26. The state suppressed evidence favorable to the petitioner.

Counsel and the petitioner are reminded that they have an obligation to not state spurious grounds or to otherwise abuse the process of this court. Any pleading filed in this case will be governed by Rule 11 of the Federal Rules of Civil Procedure.

II. On or before April 15, 2005 counsel for the petitioner shall prepare and file with the court a

memorandum: (a) bearing the signature of the petitioner which shall affirm that the conference required by section 3 of this order has been completed; (b) affirming that the petitioner understands fully that any failure to amend or state additional grounds for habeas corpus relief shall constitute a waiver of all grounds not pleaded; (c) certifying that the petitioner is fully satisfied with the representation of his habeas counsel and waives any complaint as to counsel's competency or, in the alternative, requests that present counsel be relieved and new counsel appointed; and (d) acknowledging that the petitioner understands that he has a continuing duty to inform the court at any time that he becomes dissatisfied with his her counsel's representation and that petitioner's failure to so inform the court will constitute a waiver of any claimed ineffective assistance of counsel.

III. On or before May 2, 2005 counsel for the petitioner shall either amend the petition to allege each and every ground, which may entitle the petitioner to relief, or file a written notice stating that all such grounds have been included in the petition as filed and that no amendment is required.

IV. On or before July 5, 2005 respondent(s) shall file an answer to the petition in accord with the Rules Governing Section 2254 Cases in the United States District Courts. As an adjunct to Donal Campbell, the respondent(s) shall prepare and file with the Clerk of the Court the following materials:

A. All transcripts and other state court records pertaining to all trials (whether or not they were tried to a conclusion) on the charges for which the petitioner now stands convicted, including but not limited to:

1. Voir dire instructions;
    a. Jury selection;
    b. Opening statements;
    c. Testimony;
    d. Closing arguments;
    e. Jury instructions;
    f. Verdict;
    g. Post trial motions; and,
    h. Post trial orders.
2. All state court records pertaining to actions for post-conviction relief filed by or on behalf of the petitioner attacking the conviction which is the subject of this petition. Such records shall include but shall not be limited to the following:
    a. All pleadings filed by or on behalf of the petitioner and the state's responses to such pleadings;
    b. All briefs filed in support of or in opposition to such post-conviction relief;
    c. Transcripts of any hearings conducted in the state court on any such post-conviction actions which shall include all arguments of counsel and findings, if made orally, by the court; and,

d. All written orders or opinions entered by the state courts on such post-conviction actions.

3. All briefs filed by or on behalf of the petitioner and the State of Alabama on all direct appeals made by the petitioner, as well as copies of all opinions, orders and transcripts of proceedings in the state appellate courts. Copies of opinions of the appellate courts of the State of Alabama shall be from the official reports published in the Southern Reporter and shall contain the official case citations prominently displayed thereon.

4. Narrative summaries of all previous federal habeas corpus actions filed by the petitioner in this or any other United States District Court attacking the conviction which is the subject of this petition.

If any items identified above or other items of a like nature though not specifically identified are not available, the respondent(s) shall specifically so state and when, if at all, such missing materials can be produced.

The items required to be filed shall be indexed or otherwise identified in accord with the applicable requirements of the United States Court of Appeals for the Eleventh Circuit. Counsel for the respondent(s) shall serve on one counsel for the petitioner all such materials unless it is established by direct contact with such counsel that at least one copy of all such items are

in the possession of one or both counsel for the petitioner.

V. Contemporaneously with Donal Campbell's answer, respondent(s) shall file a written brief with appropriate references to the record setting forth their positions with regard to each alleged ground for relief and any defenses which the respondent(s) may assert. Within thirty (30) days, counsel for the petitioner shall file their reply brief. Briefs shall be typewritten and double spaced on letter size paper and shall not exceed seventy-five (75) pages in length.

VI. The parties may not engage in discovery without the express permission of the court. Petitioner shall have the burden to allege and demonstrate that the petitioner did not receive a full, fair and complete hearing in state court and that the records of those proceedings are not a sufficient basis for determining the issues in this petition. Failure to do so will result in this court's examination only of the record of the state court proceedings. Any request for an evidentiary hearing must be made within the time allowed for briefing. At that point the court will consider whether the matter should be set down for an evidentiary hearing.

VII. If counsel for any party should determine that there are any unexhausted claims for which a state remedy is still available, they shall immediately inform the court in writing, designating the claim and the state relief available, and shall seek an appropriate order of this court. Opposing counsel shall respond to any such motion within ten (10) days.

As to the foregoing it is SO ORDERED this the 9th day of March, 2005.

s/ Paul W. Greene
PAUL W. GREENE
CHIEF MAGISTRATE JUDGE

FILED
2005 Apr-08 PM 02:08
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	*	
	*	
Petitioner,	*	
	*	Case No. CV 03-B-2399-
vs.	*	NE
	*	
DONAL CAMPBELL,	*	
Commissioner of the	*	
Alabama Department of	*	
Corrections,	*	
	*	
Respondent.	/	

PETITIONER'S MEMORANDUM

Pursuant to this Court's Order dated March 9, 2005, I, Cory R. Maples affirm the following:

1. My lawyers have explained to me some legal terms having to do with my case. They told me what a petition is, what a successive petition is and what an amended petition is. They told me about the rules that apply to amending petitions and about other rules

EXHIBIT
A

having to do with successive petitions. I tried to understand these as best as I could. My lawyers also explained to me that it was important to include all the reasons we could in the petition. We went over the claims that are in the petition and I want all of them to be included. My lawyers explained to me that any claims not in the petition cannot be made in a second petition. In fact, I have always wanted every claim that could be included in my case to be included, and I still want that.

2. I know that something happened in the Alabama state courts that meant that I was not able to appeal because my lawyers at Sullivan and Cromwell in New York didn't get the decision from the Alabama court in time to file the appeal. This sounds like a bad thing. My lawyers told me that the papers that got sent to them ended up being returned to the court clerk because two of the lawyers who were working on the case left the law firm. There was a local lawyer, Mr. Butler, who got the decision but never sent it along to the lawyers in New York. I don't think my lawyers at Sullivan and Cromwell did anything wrong and I'm sure they would have filed the appeal if they knew about the decision, because that is what I wanted and I had discussed that with them.

3. I never wanted to leave anything out in state court and I didn't want to drop or not file any appeal. I want all of my issues to be considered now in federal court. I want the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers because I feel that they will do everything they can for me.

April 5, 2005
s/ Eddie Davidson
Notary Public

s/ Cory R. Maples 4/5/05
Cory R. Maples

FILED
2005 May-23 PM 05/07
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	*	
	*	
Petitioner,	*	
	*	Case No. CV 03-B-2399-
vs.	*	NE
	*	
DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections,	*	
	*	
	*	
	*	
	*	
Respondent.	*	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY PRISONER IN STATE CUSTODY UNDER DEATH SENTENCE

Petitioner Cory Maples, now incarcerated at Holman State Prison in Atmore, Alabama, respectfully petitions this Court for relief from his unconstitutionally obtained conviction and death sentence.

1. Mr. Maples makes application to this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2004).

2. On October 30, 1997, Mr. Maples was convicted of the capital murder of Stacy Terry and Barry Robinson in violation of Ala. Code § 13A-5-40(10) (1994) (murder of two persons by one act or pursuant to one scheme or course of conduct) and Ala. Code § 13A-5-40(2) (1994) (murder during a robbery), in the Morgan County Circuit Court, Judge Glenn Thompson presiding. On the following day, October 31, 1997, the jury recommended the death penalty by a vote of 10 to 2.

3. On November 21, 1997, the trial court, finding one aggravating factor and one statutory mitigating factor, sentenced Mr. Maples to death.

4. Mr. Maples' conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on March 26, 1999. Maples v. State, 758 So. 2d 1 (Ala. Crim. App. 1999).

5. The Alabama Supreme Court affirmed on December 10, 1999. Ex parte Maples, 758 So. 2d 81 (Ala. 1999).

6. On October 2, 2000, the United States Supreme Court denied Mr. Maples' petition for writ of certiorari. Maples v. Alabama, 531 U.S. 830 (2000).

7. On August 1, 2001, Mr. Maples sought state collateral review of his conviction by filing a Petition for Relief from Judgment pursuant to Ala. R. Crim. P. 32.1(f).[1] At the time, Mr. Maples was represented by Sullivan & Cromwell of New York, New York and by John G. Butler of Huntsville, Alabama. Sullivan & Cromwell represented Mr. Maples *pro bono publico*,

---

[1] Among other things, Mr. Maples' Rule 32 Petition raised Sixth Amendment claims of ineffective assistance of counsel at trial and sentencing.

and Mr. Butler appeared only to move for the *pro hac vice* admission of the two Sullivan lawyers handling the matter.[2]

8. The Alabama trial court allowed Mr. Maples' petition for post-conviction relief to sit unresolved for almost two years. The court refused to schedule the requested evidentiary hearing and did not rule on the merits.[3]

9. During the interim, Mr. Maples periodically met with his lawyers. During those sessions, Mr. Maples specifically instructed his counsel to appeal any denial of his pending petition and counsel specifically assured Mr. Maples that they would do so.

10. On May 22, 2003, the Alabama court summarily denied Mr. Maples' petition. The Court's order was mailed to counsel of record.[4] In the almost two years between the filing of Mr. Maples' Petition and its denial, the two Sullivan & Cromwell lawyers who were counsel of record left the firm. The envelopes containing their copies of the May 23, 2003 Order were returned to the Alabama court unopened, with a prominent handwritten notation on one of the envelopes: "Return to Sender – Left Firm."

11. Although Mr. Butler's firm received and opened his copy of the Order, Mr. Butler did nothing – assuming that his role in the case was limited to moving for the admission of the Sullivan & Cromwell

---

[2] Sullivan & Cromwell associates Clara Ingen-Housz and Jaasi Munaanka were counsel of record in the matter along with Mr. Butler.

[3] Mr. Maples requested a full evidentiary hearing at the time he filed his Rule 32 Petition.

[4] The court did not send Mr. Maples a copy of the Order.

attorneys and further assuming that they would handle the contemplated appeal. The Court also did nothing. It did not attempt to forward the returned envelopes. Nor did it attempt to contact local counsel or to schedule a status conference to clear up any ambiguity concerning Mr. Maples' representation.

12. The State, however, was not idle. Despite knowing that Mr. Maples was represented by counsel throughout this period, the Alabama Attorney General's office waited until after the time for Mr. Maples to appeal had expired, and then contacted Mr. Maples directly and *ex parte* to inform him of that fact. The State's *ex parte* contact was the first time that Mr. Maples learned that his Rule 32 petition had been denied and that his time to appeal had expired.

13. On August 26, 2003, in light of the foregoing, undersigned counsel and Mr. Butler filed a Motion to Reissue the Court's May 22, 2003 Order denying Petitioner's Rule 32 Petition with the Circuit Court of Morgan County, Alabama. That motion was denied on September 3, 2003. On October 8, 2003, Mr. Maples petitioned the Alabama Court of Criminal Appeals for a writ of mandamus allowing him to take an untimely appeal on the merits. Mr. Maples' petition for a writ of mandamus was denied on January 23, 2004. Mr. Maples then sought a writ of mandamus from the Alabama Supreme Court on February 6, 2004. On September 4, 2004, the Alabama Supreme Court issued a *per curiam* summary decision with one dissent denying Mr. Maples an out-of-time appeal. Finally, on December 2, 2004, Mr. Maples sought a writ of certiorari from the United States Supreme Court. Mr. Maples' petition for a writ of certiorari was denied on February 22, 2005.

13a. Mr. Maples has exhausted his state court remedies. Indeed, the State has agreed, in its submission[s] to the Alabama Supreme Court that Mr. Maples may pursue the claims asserted in his Alabama Rule 32 petition in seeking federal habeas relief. In any event, the facts described above permit this Court to grant federal habeas corpus relief on Mr. Maples' claims. See 28 U.S.C. § 2254.

* * *

FILED
2005 Dec-19 PM 07:31
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CORY R. MAPLES,	)	
Petitioner,	)	
vs.	)	Case No. CV 03-B-2399-NE
DONAL CAMPBELL,	)	
Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

CORY MAPLES' REPLY BRIEF AND
REQUEST FOR AN EVIDENTIARY HEARING
PURSUANT TO MARCH 9, 2005 ORDER

* * *

Preliminary Statement

* * *

Fourth, even if there was a basis for an exhaustion or procedural default defense—there is not—Mr. Maples clearly has shown "cause and prejudice" to

excuse such a default. In the circumstances presented here—Mr. Maples was unable to appeal dismissal of his Rule 32 petition solely because his primary counsel, who had been instructed to appeal, did not receive the dismissal order—there is cause for a failure to appeal. And, if the default rule operated to preclude his claims, Mr. Maples clearly would be prejudiced by the Constitutional errors pleaded in the Petition.

* * *

D. **Mr. Maples Has Demonstrated** Cause and **Prejudice for Any Procedural Default.**

Even if Mr. Maples' federal habeas claims are procedurally defaulted—they are not—they should nevertheless be considered because Mr. Maples has demonstrated "cause and prejudice" for any such default. The Eleventh Circuit has repeatedly held that a showing of cause and prejudice excuses a procedural default. *See, e.g.*, *McNair*, 416 F.3d at 1304 n.9; *Henderson* v. *Campbell*, 353 F.3d 880, 892 (11th Cir. 2003); *Baldwin* v. *Johnson*, 152 F.3d 1304, 1319 (11th Cir. 1998).

Cause is shown when "some objective factor external to the defense impede[s] counsel's [or petitioner's] efforts to comply with the State's procedural rule." *Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999); *Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000). In this instance, as set forth in the Petition ¶¶ 8-12) and *supra* (pp. 11-12), the order dismissing Mr. Maples' Rule 32 petition—which was issued by the Court *sua sponte* more than 1½ years after it had denied Respondent's motion to dismiss and at a time when the parties expected scheduling of further proceedings or a hearing—never reached Mr. Maples,

individually or through his primary counsel. The order that was sent to Mr. Maples' lawyers in New York (who were primarily responsible for his representation) was returned to the state court with the words "Return to Sender – Left Firm" written prominently on its envelope. (Petition ¶ 10.) The state court made no attempt to have the order forwarded to Mr. Maples or to contact local counsel to clear up any ambiguity regarding Mr. Maples' representation or the appropriate mechanism for delivery of this time-sensitive document.

Cause is demonstrated here by the very fact that Mr. Maples never received a copy of the State's *sua sponte* order dismissing his Rule 32 petition. *See Bailey* v. *Nagle*, 172 F.3d 1299, 1306 (11th Cir. 1999) (cause exists for failure to timely appeal dismissal of Rule 32 Petition where petitioner never received notice of the dismissal order). Cause exists when a court fails properly to deliver the required documents so that a petitioner timely may effect an appeal. *See, e.g.*, *Dorman* v. *Wainwright*, 798 F.2d 1358, 1370 (11th Cir. 1986) ("state's failure to provide [petitioner] with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of [petitioner's] control that suffices as cause"); *Johnson* v. *Champion*, 288 F.3d 1215, 1227-28 (10th Cir. 2002) (where petitioner failed to timely appeal, cause existed because the court clerk failed to mail the petitioner a certified copy of its order and the petitioner "lacked reasonable means" to obtain the order within the 30-day time frame to file an appeal because of his status as a prisoner). Because Mr. Maples appeal "was frustrated through no fault of his own," he "has cause to excuse his default." *Roberts*, 217 F.3d at 1341.

The second prong of the "cause and prejudice" exception to procedural default—prejudice—is clearly satisfied here. Prejudice exists when "the errors ... giving rise to the constitutional claim actually and substantially disadvantaged [petitioner's] defense so that that he was denied fundamental fairness." *Roberts*, 217 F.3d at 1341. For example, prejudice is shown with respect to an ineffective assistance of counsel claim when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hollis* v. *Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991). Prejudice exists here because, as explained in his detailed 219-page Petition and *infra*, there were numerous Constitutional errors at trial and Mr. Maples was deprived of his Sixth Amendment right to effective assistance of counsel. As discussed in the Petition and *infra*, these errors clearly impacted the course of the trial and the death sentence rendered by the Judge. For example, if counsel for Mr. Maples had provided Constitutionally effective assistance, he would have introduced mitigation evidence at trial for which the Judge or jury "might have weighed the mitigating factors against the aggravating factors differently and decided on a life sentence instead of death." *Hardwick*, 320 F.3d at 1190. The sentence of death—imposed without any substantive examination of trial counsel's effectiveness by the Alabama courts—is just the type of prejudice that the "cause and prejudice" standard seeks to avoid. *See, e.g., Daniel* v. *Thigpen*, 742 F. Supp. 1535, 1553 (M.D. Ala. 1990) (holding that where Constitutional errors occurred at trial, "[t]here could be no greater prejudice to the petitioner than being sentenced to death" when otherwise the jury "may well have imposed a different sentence"); *cf. Gardner* v.

Florida, 430 U.S. 349, 357 (1977) ("death is a different kind of punishment from any other which may be imposed in this country").

* * *

FILED
2006 Oct-16 PM 02:19
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	)	
Petitioner,	)	Case No. 5:03-CV-2399-SLB-PWG
vs.	)	
DONAL CAMPBELL,	)	**ORAL ARGUMENT REQUESTED**
Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

CORY MAPLES' MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 59(e)

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Petitioner Cory R. Maples respectfully moves this Court to amend or alter its September 29, 2006 Order dismissing Mr. Maples' petition for writ of habeas corpus, which was issued pursuant to the

Court's September 29, 2006 Memorandum of Opinion ("Sept. 29 Op.").

* * *

IV. THE COURT ERRED IN HOLDING THAT MR. MAPLES DID NOT ESTABLISH CAUSE AND PREJUDICE.

Mr. Maples agrees with the Court that he can overcome a procedural default by demonstrating "cause for the default and actual prejudice as a result of the alleged violation of federal law." (Sept. 29 Op. at 8 (citing *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991)).) However, respectfully, Mr. Maples submits that the Court misunderstood Mr. Maples' argument in support of the "cause and prejudice" doctrine.

This Court held that Mr. Maples did not establish "the cause and prejudice necessary to excuse the procedural default of his Rule 32 claims" because "[t]here is no constitutional right to postconviction counsel." (Sept. 29 Op. at 17.) Mr. Maples did *not* contend, however, that ineffectiveness of his Rule 32 counsel constituted either cause or prejudice. Rather, Mr. Maples argued, and maintains here, that (1) the facts here constitute "cause," which has been defined by the courts as "some objective factor external to the defense imped[ing] counsel's [or petitioner's] efforts to comply with the State's procedural rule," *Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999); *Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000) (*see* Maples Reply Brief (Doc. #33) at 27), and (2) Mr. Maples was prejudiced because *trial* counsel did not provide Constitutionally effective assistant of counsel (*see* Maples Reply Brief (Doc. #33) at 29).

As explained in his petition and brief to this Court, Mr. Maples missed the deadline to appeal the dismissal

of his Rule 32 petition through no fault of his own. Mr. Maples was unaware of the deadline to appeal his Rule 32 petition, because he never received the state court's *sua sponte* order dismissing the petition. Indeed, the state court was aware that Mr. Maples likely did not receive the order because the copy sent to his primary counsel was returned to the clerk's office. Although the clock was ticking, the clerk's office took no action to deliver this time-sensitive document to Mr. Maples, or to locate his primary attorneys and properly deliver it to them. This is sufficient to demonstrate the "cause" prong. *See, e.g., Bailey* v. *Nagle*, 172 F.3d 1299, 1306) (11th Cir. 1999) (cause exists where petitioner never received notice of the Rule 32 dismissal order); *Dorman* v. *Wainwright*, 798 F.2d 1358, 1370 (11th Cir. 1986) ("state's failure to provide [petitioner] with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor our of [petitioner's] control that constitutes cause"); *Johnson* v. *Champion*, 288 F.3d 1215, 1227-28 (10th Cir. 2002) (cause existed where court clerk failed to mail petitioner a certified copy of its order and petition "lacked reasonable means" to obtain the order within the time frame to appeal because of his status as a prisoner).

There can be no real dispute that, if the claims set forth in Mr. Maples' Rule 32 petition—including claims of ineffective assistance of trial counsel—are never heard by this Court, there would be "prejudice." Respectfully, Mr. Maples urges this Court to hear the evidence supporting those claims, so it can make its own determination about whether Constitutional error was present, and whether habeas relief is warranted.

* * *

FILED
2007 Oct-26 PM 04:28
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CORY R. MAPLES,	)	
Petitioner,	)	
vs.	)	Case No. 5:03-CV-2399-SLB-PWG
DONAL CAMPBELL,	)	
Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

CORY MAPLES' APPLICATION FOR A CERTIFICATE OF APPEALABILITY

* * *

4. Jurists of Reason Would Find It Debatable That Mr. Maples Established Cause and Prejudice.

Mr. Maples agrees with the Court that he can overcome a procedural default by demonstrating

"cause for the default and actual prejudice as a result of the alleged violation of federal law" (Doc. 34 at 8 (citing *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991))). However, respectfully, Mr. Maples submits that jurists of reason would find this Court's decision on Mr. Maples' "cause and prejudice" argument debatable.

This Court held that Mr. Maples did not establish "the cause and prejudice necessary to excuse the procedural default of his Rule 32 claims" because "[t]here is no constitutional right to postconviction counsel." (Doc. 34 at 17.) Mr. Maples did *not* contend, however, that ineffectiveness of his Rule 32 counsel constituted either cause or prejudice. Rather, Mr. Maples has argued that (1) the facts here constitute "cause," which has been defined by the courts as "'some objective factor external to the defense imped[ing] counsel's [or petitioner's] efforts to comply with the State's procedural rule,'" *Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); *Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000) (*see* Doc. 33 at 27), and (2) Mr. Maples was prejudiced because *trial* counsel did not provide Constitutionally effective assistant of counsel (*see* Doc. 33 at 28-29).

As explained in his petition and brief to this Court, Mr. Maples missed the deadline to appeal the dismissal of his Rule 32 petition through no fault of his own. Mr. Maples was unaware of the deadline to appeal his Rule 32 petition, because he never received the state court's *sua sponte* order dismissing the petition. Indeed, the state court was aware that Mr. Maples likely did not receive the order because the copy sent to his primary counsel was returned to the clerk's office. Although the clock was ticking, the clerk's office took no action to

deliver this time-sensitive document to Mr. Maples, or to locate his primary attorneys and properly deliver it to them. This is sufficient to demonstrate the "cause" prong. *See, e.g.*, *Bailey* v. *Nagle*, 172 F.3d 1299, 1306) (11th Cir. 1999) (cause exists where petitioner never received notice of the Rule 32 dismissal order); *Dorman* v. *Wainwright*, 798 F.2d 1358, 1370 (11th Cir. 1986), *cert. denied* 107 S. Ct. 1616 (1987) ("state's failure to provide [petitioner] with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor of [petitioner's] control that suffices as cause"); *Johnson* v. *Champion*, 288 F.3d 1215, 1227-28 (10th Cir. 2002) (cause existed where court clerk failed to mail petitioner a certified copy of its order and petitioner "lacked reasonable means" to obtain the order within the time frame to appeal because of his status as a prisoner).

* * *

CASE NO. 07-15187-P

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CORY R. MAPLES

Petitioner-Appellant,

v.

RICHARD F. ALLEN,

Commissioner, Alabama Department of Corrections

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

BRIEF OF CORY R. MAPLES

* * *

STATEMENT OF THE CASE

* * *

Mr. Maples' Rule 32 Petition. On August 1,2001, Mr. Maples filed a petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure requesting post-conviction relief on eleven enumerated grounds, including claims based upon the ineffective assistance of Mr. Maples' trial attorney and the court's jury instructions, and requesting an evidentiary hearing on the merits of his claims. Mr. Maples then moved for

several orders providing for discovery of various records, files and other information necessary for a fair Rule 32 evidentiary hearing.

On September 28, 2001, the State of Alabama moved to dismiss Mr. Maples' Rule 32 petition. After extensive briefing, that motion was denied on December 27, 2001 (Doc 39 – Pg 4), and Mr. Maples thereafter awaited rulings on his discovery motions and the scheduling of a hearing (Doc 39 – Pg 4-5).

On May 22, 2003, approximately 17 months after denying the State's motion to dismiss and without issuing orders on the outstanding discovery motions or holding a hearing, the Alabama court entered an Order *sua sponte* denying Mr. Maples' Rule 32 petition for post-conviction relief. (Doc 24 – Pg 3.) Despite having denied the State's motion to dismiss, that order was a word-for-word duplicate of the proposed order submitted by the State with its motion nearly two years earlier.

Copies of the order were mailed to Clara Ingen-Housz and Jaasi Munanka, two of Mr. Maples' *pro bono* counsel who at one time were working at the New York City law firm of Sullivan & Cromwell, and also to John Butler, who appeared as local counsel for the sole purpose of allowing Ms. Ingen-Housz and Mr. Munanka to appear *pro hac vice* in the Circuit Court of Morgan County, Alabama. By May 2003, however, both Ms. Ingen-Housz and Mr. Munanka had left Sullivan & Cromwell, and thus the copies of the order that were mailed to them directly were returned to (and received by) the court with the words "Return to Sender -- Left Firm" written prominently on the envelope. (Doc 24 – Pg 3.) The state court made no attempt to have the order forwarded to Mr. Maples or to contact Mr. Butler

(local counsel) to ensure Mr. Maples would receive this time-sensitive document.

The copy sent to Mr. Butler was received by him. However, because Mr. Butler's sole involvement in the case had been to file his appearance, he assumed that lawyers at Sullivan & Cromwell (other lawyers at that law firm, including the undersigned, had agreed to handle the case after Ms. Ingen-Housz and Mr. Munanka had left) had received the May 22, 2003 order. As a result, Mr. Maples' current attorneys remained unaware that the order denying post-conviction relief had been issued. (Doc 24 – Pg 2-3.)

Mr. Maples' current attorneys only became aware of the order after the time to appeal had expired. Immediately after becoming aware of the order, Mr. Maples asked the Circuit Court to vacate and reissue its order (so that it could be appealed), which was denied, and then (at the Circuit Court's suggestion) sought permission to file an out-of-time appeal, which was rejected by the Alabama Court of Criminal Appeals on January 23, 2004 and the Alabama Supreme Court on September 4, 2004. Certiorari to the Supreme Court of the United States was denied on February 22, 2005. (Doc 24 – Pg 4.)

* * *

SUMMARY OF THE ARGUMENT

* * *

Second, the district court erred in holding that Mr. Maples had not demonstrated both cause for his procedural default and actual prejudice as a result of his trial counsel's ineffectiveness. Mr. Maples can establish cause by the fact that he never received a

copy of the Alabama court's order dismissing his Rule 32 petition, and thus his appeal was frustrated through no fault of his own. Prejudice is established because the ineffectiveness of Mr. Maples' trial counsel resulted in a denial of the constitutional rights of, and fundamental fairness to Mr. Maples.

* * *

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT MR. MAPLES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE PROCEDURALLY BARRED.

* * *

B. Mr. Maples Has Demonstrated Both Cause and Prejudice for His Procedural Default.

It is well established that a federal court will consider the merits of a defaulted claim if the petitioner demonstrates cause and prejudice. *Coleman* v. *Thompson*, 501 U.S. 722, 112 S. Ct. 27 (1991); *see also Marek* v. *Singletary*, 62 F.3d 1295 (11th Cir. 1995); *Jenkins* v. *Bullard*, No. 06-10646, 2006 WL 3635410, at *1 (11th Cir. Dec. 13, 2006) (citing *Coleman*). Thus, even if Mr. Maples' ineffective assistance of counsel claims were found to be procedurally barred, the district court should have considered these claims because he demonstrated cause and prejudice.

Cause. Cause is shown when "some objective factor external to the defense impede[s] counsel's [or petitioner's] efforts to comply with the State's procedural rule." *Strickler* v. *Greene*, 527 U.S. 263, 283 n.24, 119 S. Ct. 1936, 1949 n.24 (1999) (quoting *Murray*

v. *Carrier*, 447 U.S. 478, 488, 106 S. Ct. 2639 (1986)); *see also Henderson* v. *Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). In this case, the order dismissing Mr. Maples' Rule 32 petition—which was issued by the Court *sua sponte* more than one-and-a-half years after it had denied the State's motion to dismiss and at a time when the parties expected scheduling of further proceedings or a hearing—never reached Mr. Maples, individually or through his primary counsel.

Therefore, Mr. Maples has established cause by the very fact that he never received a copy of the State's *sua sponte* order dismissing his Rule 32 petition. *See, e.g., Bailey* v. *Nagle*, 172 F.3d 1299, 1306 (11th Cir. 1999) (cause exists for failure to timely appeal dismissal of Rule 32 petition where petitioner never received notice of the dismissal order); *Siebert* v. *Allen*, 455 F.3d 1269, 1272 (11th Cir. 2006) (recognizing that an external factor impeding petitioner's attorney from complying with a state procedural rule could constitute cause). Cause exists when a court fails to properly deliver the required documents so that a petitioner may timely effect an appeal. *See, e.g., Dorman* v. *Wainwright*, 798 F.2d 1358, 1370 (11th Cir. 1986) ("state's failure to provide [petitioner] with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of [petitioner's] control that suffices as cause"); *Roberts* v. *Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000) (cause exists when court clerk certified the record had been completed and transmitted to the appellate court, but it was not). Because Mr. Maples' appeal "was frustrated through no fault of his own," he has demonstrated "cause to excuse his default." *Roberts*, 217 F.3d at 1341

(quoting *Alexander* v. *Dugger*, 841 F.2d 371, 374 (11th Cir. 1988)).

Prejudice. Prejudice is established when a petitioner demonstrates that "the errors ... giving rise to the constitutional claim actually and substantially disadvantaged [petitioner's] defense so that he was denied fundamental fairness." *Roberts*, 217 F.3d at 1341 (quoting *Baldwin* v. *Johnson*, 152 F.3d 1304, 1319 (11th Cir. 1998)). Consequently, "there is at least a reasonable probability that the result of the proceeding would have been different." *Henderson*, 353 F.3d at 892. Prejudice is shown with respect to an ineffective assistance of counsel claim when errors at trial resulted in a denial of fundamental fairness to the petitioner. *McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992). That is clearly the case here.

"[E]rrors that undermine confidence that fundamental fairness of the state adjudication certainly justify the issuance of the federal [habeas] writ." *Williams* v. *Taylor*, 529 U.S. 362, 375, 120 S. Ct. 1495, 1503 (2000). As set out in the habeas petition, for reasons extremely similar to those in *Williams*, Mr. Maples was deprived of his Sixth Amendment right to effective assistance of counsel. During the guilt phase of Mr. Maples' trial, these errors included trial counsel's admission of certain elements of the charged offense; failure to present and pursue a defense of intoxication; the absence of appropriate objections to prosecutorial misconduct; the admission of irrelevant and highly prejudicial evidence; and the state's improper examination of witnesses. During the penalty phase, trial counsel entirely abdicated their responsibility to put forward mitigation evidence on behalf of Mr. Maples: They failed to investigate

relevant and highly pertinent mitigation evidence, including evidence relating to Mr. Maples' abusive childhood, drug and alcohol abuse, suicidal behavior and depression. Trial counsel failed even to obtain the services of a mitigation expert, a remarkable omission in light of the fact that neither trial counsel had ever conducted the guilt phase of a capital trial before.

These errors clearly impacted the course of the trial, which resulted in a death sentence by the Judge. As such, a sentence of death cannot stand without any substantive examination of trial counsel's ineffectiveness by the courts. Indeed, this is exactly the type of predicament the "cause and prejudice" standard seeks to avoid. *See, e.g., Daniel* v. *Thigpen*, 742 F. Supp. 1535, 1553 (M.D. Ala. 1990) (where constitutional errors occurred at trial, "[t]here could be no greater prejudice to the petitioner than being sentenced to death" when the jury "may well have imposed a different sentence").

Through the assistance of post-conviction counsel, Mr. Maples has uncovered numerous, highly pertinent facts directly relevant to the jury's recommendation and trial judge's imposition of the death penalty. *See Williams*, 529 U.S. at 393, 120 S. Ct. at 1513 (right "to provide the jury with the mitigating evidence that [petitioner's] trial counsel either failed to discover or failed to offer" is "a constitutionally protected right"). These include Mr. Maples' violent and abusive upbringing at the hands of his birth mother, who abandoned him twice; the relevance of that abuse, family history of mental illness and past traumatic head injury to Mr. Maples' state of extreme mental or emotional disturbance at the time of the offense; Mr. Maples' depression and suicidal behavior prior to the

offense; and Mr. Maples' documented history of cooperation with and assistance to the police in connection with the arrest of a prominent drug dealer.

It is well-settled law that a jury can consider "as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978). Accordingly, Mr. Maples' inability to place *any* of these highly relevant and important mitigating factors before the jury, through no fault of his own, raises the significant possibility that the jury "may well have imposed a different sentence." *Daniel*, 742 F. Supp. at 1553. And when the sentence is death, "there is no greater prejudice." *Id.* Fundamental fairness thus requires that Mr. Maples have an opportunity to contest the unconstitutional imposition of the death penalty.

* * *

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court with respect to Mr. Maples' jury charge claim, and remand with directions to grant habeas relief on that claim. In the alternative, this Court should reverse the district court with respect to Mr. Maples' ineffective assistance of counsel claims, and remand for the district court to consider the merits of those claims.

Respectfully submitted,

/s/ Marc De Leeuw
Marc De Leeuw
125 Broad Street, 32nd Floor
New York, New York 10004
212-558-4000

Attorney for Petitioner-Appellant Cory R. Maples

September 24, 2008

JA-280

No. 07-15187-P
(Death Penalty Case)

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CORY R. MAPLES,

Petitioner-Appellant,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court
For the Northern District of Alabama

BRIEF OF RESPONDENT-APPELLEE

---

* * *

ARGUMENT

I. Maples's Ineffective Assistance Of Trial Counsel Claims Are Procedurally Defaulted.

* * *

B. Maples Cannot Establish Cause And Prejudice For His Failure To Timely File His Appeal.

Maples next claims that he can prove "cause and prejudice" to excuse his procedural default. (Maples's brief at 20-24.) This argument is meritless.

Maples claims that he "has established cause by the very fact that he [personally] never received a copy of the State's *sua sponte* order dismissing his Rule 32 petition." (Maples's brief at 21.) In other words, Maples tries to shift the blame from his post-conviction attorneys to the circuit clerk.

But, as explained above, the circuit clerk did not send a personal copy to Maples in prison because Maples was being represented by post-conviction counsel from Alabama and New York, and Alabama law requires that all notices and orders be served on "the attorney of record," not the inmate. Ala. R. Crim. P. 34.4; *Maples*, 885 So. 2d at 849.

Maples quotes the appropriate standard on page 20 of his brief: "The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Maples simply ignores the logical application of the rule to this case. The circuit clerk did not "impede[] counsel's efforts to comply with the State's procedural rule" for filing timely notices of appeal. *Id.* If anything, the clerk *aided* counsels' efforts by mailing Judge Thompson's order to all of Maples's attorneys the day after the order was signed. The only impediment Maples faced was his attorneys' failure to act.

Thus, the district court was right: "The only ground for relief arising from the cause and prejudice analysis is premised on a claim of ineffective assistance of counsel." (Doc. 37 at 12.) And it is well-settled that there can be no ineffective assistance of post-conviction counsel because there is no constitutional right to post-

conviction counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). As a result, Maples cannot establish "cause and prejudice" by pointing at his attorneys' inactions because Maples must accept their actions as his own. *See Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003)("any ineffectiveness of [counsel] could not be considered cause for the purposes of excusing the procedural default that occurred in this case at the state collateral post-conviction level").

* * *

JA-283

CASE NO. 07-15187-P

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CORY R. MAPLES

Petitioner-Appellant,

v.

RICHARD F. ALLEN,

Commissioner, Alabama Department of Corrections

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

REPLY BRIEF OF CORY R. MAPLES

* * *

INTRODUCTION

Procedural Default. The State of Alabama does not dispute that Mr. Maples' trial was marred by a total lack of strategy and numerous errors by trial counsel. Nor does it dispute that Mr. Maples' ineffective assistance of counsel claims have never been reviewed on the merits because of a clerical mail-handling error, rather than by reason of strategy or fault on the part of Mr. Maples. (*See* Brief of Cory R. Maples ("Opening Br.") at 7, 9-10.) Given these undisputed facts, it is not

surprising that a correct application of the law should lead this Court to conclude that Mr. Maples' ineffective assistance claims are not procedurally defaulted and should have been considered on their merits by the district court. Indeed, a decision issued just weeks ago by the Alabama Court of Criminal Appeals now confirms that reversal is the necessary result here.

First, the State's contention that Alabama's rule precluding out-of-time appeals to petitioners who did not appeal through no fault of their own is firmly established and regularly followed because the Alabama Supreme Court established in 2003 "guidelines for determining whether a no-fault, out-of-time appeal is appropriate" (Brief of Repondent-Appellee ("Appellee Br.") at 17) is simply wrong. In fact, the circumstances in which out-of-time relief is available still remains confused, as demonstrated by the numerous examples of inconsistent application cited in Mr. Maples' opening brief. (Opening Br. at 17-20.) Just weeks ago, the Alabama Court of Criminal Appeals confirmed that fact, granting an out-of-time appeal to a represented petitioner because he was not served personally with the order denying his Rule 32 petition, even though his counsel received the order, *Jenkins* v. *State*, No. CR-07-0326, 2008 WL 5517612, at *1 (Ala. Crim. App. Dec. 19, 2008), a circumstance essentially identical to that presented here.

Second, although not disputing that "cause" is shown where an external factor impedes petitioner's efforts to comply with a state procedural rule, the State mischaracterizes Mr. Maples' argument as an effort to "shift the blame ... to the circuit clerk." (Appellee Br. at 21-22.) In fact, Mr. Maples demonstrated cause by showing (and it is undisputed)

that he never received a copy of the Alabama court's order dismissing his Rule 32 petition, and thus his appeal was frustrated through no fault of his own. This is not an attempt to "shift ... blame," but rather an objective recitation of the facts that resulted in Mr. Maples' failure to appeal the denial of his petition.

Third, the State's position that its representation to the Alabama Court of Criminal Appeals in opposing Mr. Maples' request for an out-of-time appeal that "Maples may still present his post-conviction claims to [federal] court" does not constitute an express waiver because Mr. Maples "is still presenting his claims from his Rule 32 petition in federal court (albeit subject to procedural default)" (Appellee Br. at 12) tortures the English language. The plain meaning and dictionary definition of the word "present" is "to lay (as a charge) before a court as an object of inquiry," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 919 (10th ed. 2000), and there is no dispute that the State has sought through the default rule to prevent Mr. Maples from "lay[ing] his claims" before the federal court "as an object of inquiry."

Fourth, the State's argument that it is not judicially estopped from relying on the procedural default/exhaustion defense because Mr. Maples "cannot show that the State prevailed *because* of" its inconsistent position (Appellee Br. at 12 (emphasis added)) misstates the law. The judicial estoppel doctrine, which contains no such requirement, prevents exactly what the State sought to do here—adopt inconsistent positions before two courts about a matter central to Mr. Maples' claims.

* * *

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT MR. MAPLES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE PROCEDURALLY BARRED.

* * *

B. Mr. Maples Has Demonstrated Cause for His Procedural Default.

The State of Alabama agrees that cause for a procedural default is shown when an objective external factor impedes petitioner's efforts to comply with the state's procedural rule. (Appellee Br. at 22.)[3] The State then argues that Mr. Maples cannot establish cause by "shift[ing] the blame ... to the circuit clerk." (Appellee Br. at 21-22.) This straw-man argument misses the point.

Mr. Maples demonstrated cause because an external objective factor—a mailroom oversight—impeded his efforts to comply with a state procedural rule. (Opening Br. at 20-21.) This mailroom clerical error qualifies as an "exculpatory reason" for not filing a timely appeal from the *sua sponte* dismissal of Mr. Maples' Rule 32 petition. As this Court has explained in *Dorman* v. *Wainwright*, "the cause and prejudice doctrine focuses on procedural missteps ... whether committed intentionally, inadvertently, or negligently." 798 F.2d 1358, 1370 n.22 (11th Cir. 1986).

Mr. Maples is not seeking to "shift the blame" to the circuit clerk or anyone else. (*See* Opening Br. at 20-21.)

---

[3] The State does not dispute that Mr. Maples has established prejudice here. (*See* Appellee Br. at 21-23; Opening Br. at 22-24.) Accordingly, the second prong of the "cause and prejudice" analysis need not be considered on appeal.

Rather, because "clerical error was to blame," Mr. Maples has established cause to excuse a procedural default. *See Roberts* v. *Sutton*, 217 F.3d 1337, 1340-41 (11th Cir. 2000) (cause exists where possible clerical error resulted in failure to transmit trial record to appellate court). In short, it is undisputed that Mr. Maples has demonstrated cause because his efforts to comply with a state procedure were "frustrated through no fault of his own." *Id.* at 1341 (quoting *Alexander* v. *Dugger*, 841 F.2d 371, 374 (11th Cir. 1988).)[4]

* * *

CONCLUSION

For the foregoing reasons and those set forth in Mr. Maples' opening brief, the Court should reverse the judgment of the district court with respect to Mr. Maples' jury charge claim, and remand with directions to grant habeas relief on that claim. In the alternative, the Court should reverse the district court with respect to Mr. Maples' ineffective assistance of counsel claims, and remand for the district court to consider the merits of those claims.

---

[4] The State also contends that Mr. Maples' cause argument is based on a claim of ineffective assistance of counsel. (Appellee Br. at 22.) This mischaracterizes and ignores the crux of the issue—that Mr. Maples' constitutional claims have never been reviewed due to a procedural bar caused by a mailroom oversight, an objective external factor that is in no way attributable to Mr. Maples or his counsel.

Respectfully submitted,

/s/ Marc De Leeuw
Marc De Leeuw
125 Broad Street, 32nd Floor
New York, New York 10004
212-558-4000

Attorney for Petitioner-Appellant Cory R. Maples

February 2, 2009

[Trial Exhibit 233]

VOLUNTARY STATEMENT

(Under Arrest)

DATE: 08-02-95 TIME: 3:32 A.M. PLACE: Nashville, Tennessee

I, Cory Ross Maples, am 21 years of age and my address is Rt. 3 Box 184-A, Decatur, Alabama. I have been advised and duly warned by Inv. Howard E. Battles, who has identified himself as an Investigator for Morgan Co. Alabama, of my right to the advice of counsel before making any statement, and that I do not have to make any statement at all, nor incriminate myself in any manner.

I hereby expressly waive my right to the advice of counsel, and voluntarily make the following statement as to the aforesaid person, knowing that any statement I make may be used against me on the trial or trials for the offense or offenses concerning which the following statement is herein made.

I declare that the following statement is made of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

[CRM] Sometime around midnight on the night of Friday, July 8, 1995, I shot and killed two boys while they sat in a car in the driveway of my home in Morgan Co., Alabama. They were Stacy Terry, who was known by most people as Twinky, and ~~the~~ [CRM] Barry Robinson. They were sitting in Twinky's 1995 Maroon Camaro when I shot them. I used a .22 rifle from my

parents bedroom to kill them. I don't know why I did it. After I killed Twinky and Barry, I pulled Twinky out of the car and drove to a nearby bridge and threw Barry in a creek.

Twinky and I got together about 7 or 7:30 on that Friday, at his sister's house. We were getting along fine. We stayed about 35 or 40 minutes at Twinky's sisters house. Her name is Carla. By then I had drank 6 or 7 beers. I didn't feel very drunk. Twinky and I went by Q Balls. I believe we just passed by that time and rode around awhile. Then we went in Q Balls and shot a few games. We played with Jason Boyd, Jason White, another guy named Jason and a regular there named Tim. I don't remember seeing Barry there then. We shot 2, 3, or 4 games of pool. We may [2 of 4] have been there an hour, but I doubt it. When we left, it was just me and Twinky. I think we drove by Heather and April's. Heather's last name is Davis, and I don't know April's last name. I used to date Heather. We were all just friends basically. I don't remember them being home. I was probably 10 or 10:30 P.M. We rode around and went back to Q Balls. There were a few more people there. Barry was there. I don't know who with. We were there for about an hour or hour and fifteen minutes. We left about 11:30 or a quarter til. Twinky talked to Barry. I don't know what happened with his ride, but Twinky said he would take Barry home. Twinky was driving, I was in the front passenger seat and Barry was behind me. We took the Chapel Hill Rd. way to my home on Mud Tavern Rd.

When we pulled into my driveway, I got out and went in the trailer through the back door and went to my parent's bedroom. I could see the car out the window, and Barry was fumbling with the seat and

finally sat down in the seat I had been in. I got my Dad's .22 caliber semiautomatic rifle. I believe it was a Marlin. I went back out the back door, walked up to the car and shot Twinky twice somewhere between the top of the [CRM] [3 of 4] [CRM] shoulder and the top of the head. Then I shot Barry once I believe. Neither of them said anything. I pulled Twinky out of the car, and then took the gun back in the trailer and left the gun where I got it from — right by the bedroom door, leaning up against the headboard of the waterbed.

I went back outside, got Twinky's billfold and checked it and threw it in the car. I believe it had five twenties in it. Then I drove off with Barry in the car. I went to a nearby bridge over a creek and pulled Barry out of the car and threw him in the creek. I then went to Heather and April's house. April was by herself. I stayed there about 30 to 50 minutes. I washed some of the blood off of my legs. I don't remember using a towel. My socks had blood on them, so I put them under April's couch. My No Fear T-shirt had blood on it. I still have it. It is in a laundry bag back at the motel room here in Nashville.

I have had no weapons since this happened. I am not a member of a gang or any group like that. My religion is Baptist I guess. I have never had anything to do with Devil Worship.

I don't know why I did all this. I have had a lot on [4 of 4] [CRM] my mind. I've always been a screwup. I've been lonely and I felt bad about all I've put my parents through and stuff like that. I have just been really down on myself.

I can't think of a reason why I did this. I know that sounds dumb, but I just draw a blank when I think of it.

This statement has been written by Investigator Battles. I voluntarily told my story and then he wrote this down. He has written what I told him. [CRM]

I have read this statement consisting of 4 page(s), and I affirm to the truth and accuracy of the facts contained therein.

This statement was completed at 5:17 A M. on the 2nd day of August, 1995.

WITNESS: s/ Howard E. Battles

WITNESS: s/ Byron Whitten

s/ Cory R. Maples

Signature of person giving voluntary statement.

IN THE CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA

CORY R. MAPLES, Petitioner,	)	
vs.	)	Case No. CC-95-842.60
STATE OF ALABAMA, Respondent.	)	

EXCERPTS FROM TRIAL TRANSCRIPTS
DATED OCTOBER 20-31, 1997

[Closing Statement of Defense Counsel]

* * *

[2919]

* * *

I'm not saying -- and we'll talk about the State's case in a minute about robbery, but remember the burden of proof in the case. When we have this evidence that there isn't a robbery here, they have to, by real evidence, say this is all wrong, there is nothing to this, this is absolutely wrong, you have absolutely no reason to believe this is true whatsoever. Remember, it's their burden of proof by evidence, not by speculation. You can't speculate that he was wrong about this. What evidence can they put forth that this didn't really happen the way he described it in his statement in which he confessed to two murders. They mention something about drug usage, which he denies in his statement. That **[2920]** denial of drug usage is consistent with the State's evidence, with all the

evidence from the stand, with two exceptions, and we'll talk about the two exceptions in a moment. Let's remember Le Ann Clemons from Caddy Shack and Beverly Shawnbaum in Caddy Shack, people at the pool hall at Q-Balls, Jamie Dobbs, people that had seen these two gentlemen, Stacy Terry and Corey Maples, out that night along with Barry Robinson later, never saw Corey Maples high, never saw him consuming drugs. You can bet your bottom dollar if there was a witness out there who could say that, he would be in this courtroom, but he's not here because it did not happen. There is no evidence that he consumed drugs that night. Even April Phillips, this person who says he came in and appeared messed up, he has already testified in his statement that he was freaking out. That would create the impression of messed up. This man's mind had done something horrible and snapped and he had taken [2921] two human lives. He was freaking out and she sees him in that condition and he's making up stories and he's doing all this crazy stuff and she assumes he is messed up on drugs; this girl who has admitted has a drug problem. The only evidence that they could tie with drug usage at that place is this so-called RC can, but there is no fingerprint evidence on that RC can attached to Corey Maples, or anybody else for that matter. It was at the house of a girl who tells us she had a drug problem at the time, so that doesn't prove – in other words, that's a circumstance but there is a circumstance consistent with his innocence as to that circumstance, so that doesn't help the State prove their point. They also mentioned Fishbone. Mr. Matthews says he's not a witness he would go out and try to elicit, but there is something interesting about – there are a lot of things interesting about Fishbone's statement to you and testimony to you. He said that

Corey [2922] – well, he couldn't identify him. Do you remember that? He couldn't identify Corey Maples; and then he slips out or says that he was told it was Corey Maples later. Remember that his statement was taken sometime about seven days after these events which was July 14th. Here he is out there and all this news coverage and he says that he went back to the pawnshop the day after – or the day he went to the pawnshop in order to asked "man, was this cue stick involved in some sort of murder or whatever." Mr. Nickens testified that didn't happen that way. He didn't come in there asking about that. He came in to pawn a ring and while he was there Mr. Nickens called the law on him. I don't know exactly what happened about the pool stick; but has the State by competent, credible, believable evidence given you an explanation as to what happened with the pool stick? Given Mr. Fishbone's testimony, that's the only testimony about the pool stick. Look [2923] carefully at that. Is that credible and can you hang your hat on it? Mr. Fishbone tells us that whoever came in that night was looking for – trying to sell things, trying to sell some mysterious car stereo that apparently had been ripped out of a car, trying to sell all kinds of other things in the car, and trying to sell this pool stick. He said he gave this guy thirty or forty dollars for the pool stick. I forget what he said, but remember the State's evidence from the witness stand – I mean, from the statement was that Corey Maples said that he had received or he had gotten after the death of Stacy Terry, five twenty dollar bills. Now, a man with one hundred dollars in his pocket, and according to Fishbone, is coming there still trying to get more money in order to feed this drug habit. Fishbone's statement was that it happened right after the murder. Remember the time he described for

us. Fishbone's statement and April statement does not conclusively prove that **[2924]** there was an element of robbery to feed a drug habit.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 07-15187-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 05 2010
THOMAS K. KAHN
CLERK

CORY R. MAPLES,

Petitioner/Appellant,

-vs-

RICHARD F. ALLEN,

Commissioner of the Alabama Department of Corrections,

Respondent/Appellee.

Appeal from the United States District Court
For the Northern District of Alabama

Oral arguments held in the above-entitled matter before the Honorable Frank H. Hull, the Honorable J.L. Edmondson, and the Honorable Rosemary Barkett.

May 18, 2009

[2] APPEARANCES:
SULLIVAN & CROMWELL,
BY: MARC DE LEEUW, ESQ.,
125 Broad Street
New York, New York, 10004
Appearing for the Petitioner/Appellant

COREY LANDON MAZE, ESQ.,
Attorney General of the State of Alabama
500 Dexter Avenue
Montgomery, Alabama, 36130-0001

PROCEEDINGS

JUDGE EDMONSON: This is Maples versus Allen. Is it DeLeeuw?

DeLeeuw.

MR. DE LEEUW: Yes, Your Honor, DeLeeuw, Marc DeLeeuw.

JUDGE EDMONSON: Mr. DeLeeuw, would you come around and speak to us, please?

MR. DE LEEUW: Yes, thank you very much, Your Honor.

May it please the Court, Marc DeLeeuw for petitioner/appellant Cory Maples.

[3] The relevant facts here at issue are not on dispute - on appeal, Mr. Maples was convicted of capital murder and no Court has yet heard substantively most of his claims on post-conviction proceedings.

In particular, no Court has ever substantively analyzed any of the facts giving rise to his claim that he was - had ineffective assistance of counsel during his trial and sentencing phase and as we allege with specificity in the Habeas Petition, Mr. Maples' trial counsel did almost nothing to defend him for the charge

of capital murder, but most importantly, did almost nothing to investigate the mitigating evidence that could have been used at trial. He didn't investigate –

JUDGE EDMONDSON: All right, but procedural bar.

MR. DE LEEUW: Sure.

JUDGE EDMONDSON: What's the story about that?

MR. DE LEEUW: Well, I think, again, the facts here are not in dispute. The whole procedural bar comes down to a mail room error that was made in New York.

Just to review the facts, in August of 2001, Mr. Maples filed his Rule 32 request for post-conviction relief, which contained the ineffective assistance of counsel claims.

In September of 2001, the State moved to dismiss that petition. We filed many briefs on that issue and in December of 2001, the Alabama Circuit Court rejected the Motion to Dismiss, therefore saying that Mr. Maples had adequately pled his [4] Rule 32 petition.

So pursuant to Alabama Law, we were all waiting for the Alabama Court to schedule a hearing and also rule on some discovery motions. Mr. Maples had made some discovery motions at the outset of the proceedings and those hadn't been ruled on.

Nearly a year and a half passed, nothing happened. During that time period, the two lawyers, two associates at my firm who had been working on the matter, had left the firm and other lawyers at my firm, including myself and my colleagues, agreed to handle the matter from then on.

Again, a year and a half passed, we were all waiting for the hearing to be scheduled pursuant to Alabama Law, that's what required if a petitioner sets forth adequately his pleading.

And then a year and a half later, Sua Sponte, the Judge rendered an Order dismissing Mr. Maples' Rule 32 petition. The Order that the Circuit Court rendered was the word for word copy of the proposed Order that the State had submitted back in its Motion to Dismiss a year and a half earlier. Again, this was Sua Sponte.

The Circuit Court Clerk then sent copies of the Order to the two associates at my law firm –

JUDGE EDMONDSON: And –

MR. DE LEEUW: And here's the - here's the [5] clerical error. In New York there was a clerical error which should have –

JUDGE EDMONDSON: Now, I thought that in addition to two associates, Sullivan, right, Sullivan and –

MR. DE LEEUW: Sullivan and Cromwell, yes.

JUDGE EDMONDSON: In addition to that, there was Alabama counsel –

MR. DE LEEUW: Yes, that's –

JUDGE EDMONDSON: - of record?

MR. DE LEEUW: - that's correct, Your Honor.

JUDGE EDMONDSON: And that lawyer was also sent a copy, is that correct?

MR. DE LEEUW: That is correct, Your Honor.

JUDGE EDMONDSON: And it is undisputed that that lawyer, in fact, got a copy, is that correct?

MR. DE LEEUW: That's correct, Your Honor, but what happened here, and it's - again, I wouldn't spend much time on these facts, but for the fact that it would

be so tragic if the District Court is not reversed, all of what would happen in this case would be dictated by essentially a clerical error and the facts aren't really disputed –

JUDGE EDMONDSON: Well –

MR. DE LEEUW: - you're absolutely right, Your Honor.

JUDGE HULL(?): Just out of curiosity - what was [6] the clerical error?

MR. DE LEEUW: The clerical error was, in a mail room in New York, what should have happened was that the Order should have been sent to me instead of somehow in the mail room in New York –

JUDGE HULL: What was somehow - it was addressed to the other two lawyers, right?

MR. DE LEEUW: Exactly.

JUDGE HULL: Well, did you notify the Clerk's office to put your name on the pleadings?

MR. DE LEEUW: No, Your Honor. At that point we were waiting for any further proceedings and at that point, when we knew when those proceedings would take place, we would - knew which lawyers would be proceeding. I had taken responsibility for the matter and –

JUDGE HULL: You never notified the Court –

MR. DE LEEUW: That's correct, Your Honor.

JUDGE HULL: - how would the Clerk - I mean why isn't it a reasonable clerical error that - if a letter is addressed to a lawyer who's no longer there gets sent on to the lawyer who's no longer there?

MR. DE LEEUW: Well, first of all, just to make sure I'm clear because –

JUDGE HULL: It's really upsetting to me. I mean - no kidding, I'm speaking only for myself, but I mean I - I [7] find it appalling that those lawyers never did anything with the notice, apparently.

It got sent to them, I take it, they did nothing?

MR. DE LEEUW: No, they never - they never knew about it and it's upsetting to me, Your Honor, as well.

JUDGE HULL: Well, did your clerical people send it on to them?

MR. DE LEEUW: No, and that's - it wasn't my clerical people --

JUDGE BARKETT(?): They sent it back to the Court --

MR. DE LEEUW: - it was a mail room, but --

JUDGE HULL: Oh, they sent it back, that's right, I forgot, I'm sorry.

MR. DE LEEUW: - they sent it back and they wrote - left firm to the Clerk to - on the envelope. It was received by the Clerk and the Clerk didn't take any further action, but, Your Honor, to just dispel I think an argument the State has made and perhaps suggested, Mr. Maples is not blaming this on the Clerk of the Circuit Court.

What happened here was a clerical error on their mail room. What should have happened at - in New York City was that these envelopes should have been passed to me, that was the error. It should have been passed to me, had it been passed to [8] me --

JUDGE HULL: What, all of their mail was going to you?

MR. DE LEEUW: What happens in New York, and what's supposed to happen, which didn't happen in

this case is that when a lawyer who has left the firm receives some mail, particularly from a Court, but even - and any other mail, then the lawyers who have taken responsibility for that matter are supposed to be getting that mail, or at least inquired of before anything further is taken.

Somehow the mail room --

JUDGE HULL: What about the lawyer here?

MR. DE LEEUW: What - excuse me?

JUDGE HULL: What about the - that's really what Judge Edmondson --

MR. DE LEEUW: Right.

JUDGE HULL: - question was directed at and something we have to deal with.

He had a lawyer here, what did he do with the letter?

MR. DE LEEUW: Well, and this is a very unfortunate part of what happened, that lawyer had assumed that there would be no clerical error, and that the lawyers who were handling the matter in New York, were doing what was appropriate, which was to file a Notice of Appeal and he, [9] therefore, took no action and it's - you're absolutely right, Your Honor, believe me, I was more upset about it than I could imagine than any of you or - having reviewed the record now would be. This was in - a horrible clerical error that should not have happened, but again, it was a clerical error, it was not a --

JUDGE HULL: Well, it isn't a clerical error, because the lawyer who did get it did nothing. What's clerical about that?

MR. DE LEEUW: There is nothing clerical about that, Your Honor.

JUDGE HULL: That's - I mean --

MR. DE LEEUW: That's - he had assumed and in the normal case, this would be what would happen, he had assumed that the lawyers - his only responsibility in this case had been to essentially become a lawyer who could be used to get pro hac vice and –

JUDGE HULL: Really, is that right? You mean --

MR. DE LEEUW: He didn't –

JUDGE HULL: - when a lawyer --

MR. DE LEEUW: - no, he has a --

JUDGE HULL: - when a lawyer files a Notice of Appearance in this court and a New York lawyer is also involved, we're to assume that he has no respon – [10] is there a rule or something --

MR. DE LEEUW: No --

JUDGE HULL: - that says you're not responsible for anything?

MR. DE LEEUW: - no, Your Honor. You're absolutely right, Your Honor. I'm not, in any way, suggesting that what counsel did in Alabama was correct, was the right thing to do. I'm just merely saying what happened in that circumstance, perhaps not correct, but at least understandable.

He thought that it was being handled in New York and that's why he didn't -

JUDGE HULL: Well, okay.

MR. DE LEEUW: - that's why he didn't do anything.

JUDGE HULL: But that's not a legal reason to give you relief –

MR. DE LEEUW: Well –

JUDGE HULL: - that's the problem in this case.

Can you address how we can possibly give you relief in light of what the Alabama Court seemed to say about it?

MR. DE LEEUW: Sure, Your Honor. You're absolutely right, that's - we're not seeking here to say that what counsel did was right or what the mail room did in New York was right.

JUDGE HULL: How can we give you relief?

MR. DE LEEUW: Well, the first and most important [11] reason is that for a rule to be the basis for a procedural default, it needs to be firmly established and regularly followed and the District Court held that the no fault out of time appeal, there's a rule in Alabama about these very sort of circumstance when you don't appeal on a timely basis, when you didn't receive it. It's called the no fault out of time appeal and what the District Court said was that rule is regularly followed, but also said in granting the certificate of appealability, that that's a matter that could be up for debate.

JUDGE HULL: Wait a minute.

No fault out of time appeal?

MR. DE LEEUW: Yes.

JUDGE HULL: Is that applied to Rule 32 or does that apply to direct appeals?

MR. DE LEEUW: To both, Your Honor, and there's a rule in Alabama State Court, 32.1(F) provides that a petitioner can file a successive, a second Rule 32 petition if he did not receive denial of his first petition again, through no fault of his own, and there's a procedure, and, in ~~fact, the~~ new rule in Alabama is that the petitioner has from six months after receiving

notice of that Order, 32.2(C) provides a six month time period --

JUDGE HULL: I have a timing question.

You said he filed the Rule 32 in 2001. Am I correct, that provision (F) and I'm not trying to draw a [12] conclusion from this, did not exist. We really - that was a rule that came about later on, but it - it did not exist, but still, the body of Alabama Law was essentially similar to the rule.

MR. DE LEEUW: I --

JUDGE HULL: I just want to make sure we should be looking at a statute to see if it was firmly established or whether it was case law.

MR. DE LEEUW: That's --

JUDGE HULL: Which one should be looking at at the time Alabama said they denied - not the Supreme Court, but the Court of Appeals, denied the out of time appeal?

MR. DE LEEUW: It was case law at that time, you're absolutely right, Your Honor.

JUDGE HULL: Okay, all right.

So, I just want to narrow that --

MR. DE LEEUW: Right.

JUDGE HULL: - I know we now have the statute.

MR. DE LEEUW: Right.

JUDGE HULL: But at this time we had case law.

MR. DE LEEUW: Huh--huh.

JUDGE HULL: And what the State says is this - and they kind of concede that there was some out of time appeals granted under the case law, but at this time, you can cite no case they say where Alabama has ever allowed that to occur where [13] it was this type

of situation where lawyers had actual notice, even though the defendant didn't and I know you cite Marshall (ph), I think maybe perhaps, but Marshall didn't have a lawyer. He was pro --

MR. DE LEEUW: Marshall did have a lawyer actually.

I don't think there's any dispute here that Marshall did, in fact, have a lawyer.

There is a dispute about the Jenkins (ph) case, which was --

JUDGE HULL: Right.

MR. DE LEEUW: - which was later in time.

JUDGE HULL: Yeah.

MR. DE LEEUW: But the Marshall case is undisputed. The facts are undisputed.

JUDGE HULL: Now, did Marshall pre --

MR. DE LEEUW: Marshall had a lawyer.

JUDGE HULL: - did Marshall preexist the time - post-conviction, Criminal Court of Appeals said no out of time appeal?

MR. DE LEEUW: Yes.

JUDGE HULL: Okay.

MR. DE LEEUW: Marshall did.

JUDGE HULL: What was the date at the time that the Alabama Court of Criminal Appeals said no out of time [14] appeal, just the year, approximately, I --

MR. DE LEEUW: That was 2004 --

JUDGE HULL: Okay.

MR. DE LEEUW: - I think - I believe it was early 2004 and 2003 was the time that the Circuit Court had issued its opinion.

JUDGE EDMONDSON: In Marshall, as I recall it, petitioner was filing documents pro se as well as having counsel.

MR. DE LEEUW: That's correct, Your Honor.

JUDGE EDMONDSON: And had expressly requested direct notification, is that not so?

MR. DE LEEUW: No, the latter part is incorrect, Your Honor.

There was no - and this the State's argument. The State's argument is Marshall is distinguishable, because of those pro se motions that were filed, but there is no dispute that Marshall did have counsel and there's also no dispute that Mr. Marshall's counsel did, in fact, receive the Order.

Now, what the State says is that in Marshall, the Circuit Court of Criminal Appeals, which granted an out of time appeal, did so on the basis of a duty that the Clerk had to - to make Mr. Marshall aware of any Orders and respectfully, that's just created out of whole cloth. There is no such ruling in the Court of Criminal Appeals' decision in Marshall.

[15] In fact, the Court in Marshall never uses the word duty, the Court of Criminal Appeals. It doesn't rely on any such duty and never says that it thinks that the reason it should grant an out of time appeal is because of some duty.

Now, what the State does say is that the Supreme Court decision in Marshall established the guidelines for granting an out of time appeal.

Now, before I get on - I talk about whether that's correct or not, even if it were correct, that's essentially a concession that the rules were not firmly established

or regularly followed as of the time of the Marshall Supreme Court decision.

The Marshall Supreme Court decision was rendered after Mr. Maples had already failed to appeal within the requisite time. Mr. Maples' Order was in - excuse me, May of 2003 and so, therefore, under the rules in Alabama, his time to appeal ran in June of 2003.

The Marshall Supreme Court decision was rendered in September of 2003 and according to the State, that was the case that established the guidelines for following an out of time appeal and if that's so, well, then, of course, the rules weren't firmly established and regularly followed as of that time and that's the relevant time that the Ford versus Georgia case always says that firmly established and regularly followed must be at the time it's to be applied in the habeas case.

[16] So then the question about what exactly the Supreme Court in Marshall did. As the State says elsewhere –

JUDGE HULL: Yeah, I thought they just said the only holding in Marshall is that you need to go do a Writ of Mandamus --

MR. DE LEEUW: That –

JUDGE HULL: - they just say that's the vehicle to do it.

MR. DE LEEUW: That's correct. That is what the Supreme Court held in Marshall.

JUDGE HULL: They don't actually grant an out of time appeal.

MR. DE LEEUW: That's correct, Your Honor.

JUDGE HULL: Okay.

MR. DE LEEUW: In fact, that's --

JUDGE HULL: That's why the State says that doesn't help you. I don't know whether it does or doesn't, but that's why they say what they say.

MR. DE LEEUW: That's correct and that part is correct. That is what the Supreme Court in Marshall did, but I should note that the State also says, this is at 17 of its brief, that the Supreme Court in Marshall established the guidelines for determining whether a no fault out of time appeal is appropriate.

As I said, if that's true, that's too late to help [17] Mr. Maples and, therefore, is grounds not to follow that rule for purposes of its Habeas Petition, but then going on to what Your Honor just said, Judge Hull, you're absolutely correct.

What the Supreme Court in Marshall did was solely determined what the proper procedure was and it said that a Writ of Mandamus is the proper procedure to be following - to be filing for an out of time appeal.

I then should note, that rule also was changed in 2005 with respect to the Alabama --

JUDGE HULL: Well, we don't need to worry about that, cause that's not where we are, we're in 2004 and that was the right way and --

MR. DE LEEUW: Well --

JUDGE HULL: - and your client did that.

MR. DE LEEUW: - yes, because the Marshall --

JUDGE HULL: He did that.

MR. DE LEEUW: - the Marshall decision was -

JUDGE HULL: Right.

MR. DE LEEUW: - was rendered after Mr. Maples had failed to file his out of time appeal.

JUDGE HULL: And, in fact, twice, all three Courts refused to give him an out of time appeal.

We've had three - in this case, refused to give him an out of time appeal.

MR. DE LEEUW: That's correct and what we point [18] to is the fact that what you have here is three different decisions of the Court of Criminal Appeals in Alabama.

There's the decision in Marshall, which there is no dispute Mr. Marshall had a lawyer, Mr. Marshall's lawyer did receive the Order denying his Rule 32 petition and the Court of Criminal Appeals held in that case, that Mr. Marshall should get an out of time appeal.

Then you have this case where again, those facts are identical in relevant part and the Court of Criminal Appeals said no out of time appeal and then the third case is the Jenkins' case –

JUDGE EDMONDSON: The case went all into - the Marshall case went on to the Supreme Court.

MR. DE LEEUW: That's correct.

JUDGE EDMONDSON: Did they vacate the intervening Order?

MR. DE LEEUW: They did, they did, because of the –

JUDGE EDMONDSON: Well, then it's nothing, right?

MR. DE LEEUW: Well, no, it's not nothing because the whole point of the firmly established and regularly followed rule is to determine whether the Court or proceeding in a regularly followed way so that we know that we can rely on that.

JUDGE EDMONDSON: If you knock out Marshall, the intervening - the Appellate Court

decision, then nobody's ever [19] gotten relief under the circumstances you're describing, is that true?

MR. DE LEEUW: Well, no, then you would go to Mr. Jenkins and Mr. Jenkins, as we point out in the Rule 28(J) letter, Mr. Jenkins also received - did not receive a copy of his first Rule 32 petition.

In filing a second, now as I mentioned, the procedure changed –

JUDGE HULL: Well, there's nothing in Jenkins that says whether his attorney got the - the mailing or not.

MR. DE LEEUW: Well, the –

JUDGE HULL: - that's the problem with Jenkins –

MR. DE LEEUW: Well –

JUDGE HULL: - Jenkins doesn't help you.

They don't say the attorney got it, but we're still going to let him have it.

MR. DE LEEUW: Well, what actually –

JUDGE HULL: It doesn't say the attorney received it.

MR. DE LEEUW: Well, in fact, what happened was, both the State and then the Circuit Court of Criminal Appeals noted that his attorney did receive it.

The State said in its Motion to Dismiss, which we (inaudible) with our Rule 28(J) letter, the State said in its Motion to Dismiss, that the second out of - excuse me, the second [20] Rule 32 petition should be dismissed because the case action summary, which it attached, as Exhibit A, clearly shows that the defendant, his attorney and the District Attorney were notified of the Order on January 11th, 2007 and then it attached the case action summary, which just has a

single line there saying defendant, attorney and D.A. not notified of Order and that's what the Court of Criminal Appeals saw and the Court of Criminal Appeals said I'm going to remand it back to the Circuit Court to determine this disputed factual issue.

The Circuit Court found only that –

JUDGE HULL: What is the disputed factual issue?

MR. DE LEEUW: Whether or not as the State said that Mr. Jenkins, and his attorney and the D.A. were all notified of this - of this order on January 11th

JUDGE HULL: That kind of implies if they were notified, they weren't going to grant relief.

MR. DE LEEUW: Well, no. Actually what happened was the Court of Criminal Appeals said if there's a dispute about whether they actually got it or not and so they said well go - you should go back to the Circuit Court –

JUDGE HULL: Well, what I'm trying to say, it was undisputed that Mr. Jenkins ever got it.

MR. DE LEEUW: Actually, no, at that time, it was not. In the first appeal what happened was - excuse me, when the Circuit Court of Criminal Appeals first got this appeal, the [21] State said Mr. Jenkins and his attorney got it and they referred to the case action summary.

So the Court of Appeals said wait, there's a disputed issue here. We don't know whether, in fact, this actually happened.

JUDGE HULL: So there was a disputed issue of who got it and when?

MR. DE LEEUW: Exactly.

JUDGE HULL: Can - I don't know if my colleagues -- I wanted to move to exhaustion cause I have - there may be an answer to this, but it just wasn't apparent to me, but did you really even need to decide all the procedural Bar business because at the end of the day, he hasn't exhausted his claims cause he (has)? an appeal, forget about why he didn't appeal procedural Bar, but he didn't go to the Alabama Criminal Court of Appeals or the Alabama Supreme Court on his substantive claims.

So he hasn't exhausted these federal claims. They've never been heard by those Courts, okay, and so do we really need to decide the firmly established regularly followed piece of this cause he failed to exhaust.

Now, I think we'd still have to decide the waiver and judicial estoppel business.

MR. DE LEEUW: Yes. Your Honor, I think both sides in this appeal have said that the procedure - in this [22] case, sometimes it's not always the case --

JUDGE HULL: Right.

MR. DE LEEUW: - but in this case, procedural default and the exhaustion doctrine are inextricably linked and so --

JUDGE HULL: Right.

MR. DE LEEUW: - because of that --

JUDGE HULL: But what I'm saying is, isn't it true we could - we don't really have to decide whether it was procedurally barred, we could say - we don't really decide that. We know he didn't exhaust, okay?

MR. DE LEEUW: Right.

JUDGE HULL: And when I say procedurally barred, that it was regularly followed and firmly established.

MR. DE LEEUW: Well –

JUDGE HULL: We don't have to do that because if he failed to exhaust, okay, which is clearly the case here, he didn't get a substantive ruling from the Courts or any ruling on these claims unless there's some waiver of that defense, the State has a good exhaustion defense.

MR. DE LEEUW: I would say respectfully, Your Honor, I think Your - this Court does because in this case, because - the reason for the lack of decision by the Court of Criminal Appeals in the Alabama Supreme Court is the procedural default and that's why both parties say that - the two issues [23] are inextricably linked and so, essentially the reason that there's no exhaustion –

JUDGE HULL: I think they're inextricably linked for purposes of whether the State's waived them, but I'm not sure they're linked for purposes of whether I've got to - or this Court would have to decide firmly established. Exhaustion doesn't require anything to be firmly established.

MR. DE LEEUW: Well, but the reason for the exhaustion is a finding of - is essentially a default - a procedural default and so –

JUDGE HULL: No, no. The reason for exhaustion is he didn't appeal.

MR. DE LEEUW: Right, and that's –

JUDGE HULL: It is a –

MR. DE LEEUW: - that's because of a procedural default and so –

JUDGE HULL: Well no, you could go off on procedural default.

My question is, do you have to do that?

MR. DE LEEUW: I would say, Your Honor, respectfully, I think you do, obviously I would like to minimize the number of issues Your Honor's need to consider, but the reason that there's no exhaustion here, sometimes it's not the case, sometimes exhaustion has one - there's one rationale for exhaustion and something different on procedural default, but [24] here, the reason that there's no substantive opinion is because there was no opportunity to appeal, it's not out of any choice and the reason there was no opportunity to appeal is the procedural default.

So what essentially Alabama's Courts are saying is we're not going to hear those matters because of our procedural rule and that's the procedural default doctrine and that's why the firmly established and regularly followed doctrine is so important here is because that's what barred Mr. Maples from proceeding to exhaust.

There's no doubt - there's no dispute here that Mr. Maples did want to exhaust his claims, but he was barred from doing so under the procedural default doctrine. So the question is whether the default can be - can be maintained in the face of a non-firmly established, non-regularly followed statute, but if I could –

JUDGE EDMONDSON: I'm just - I'm very curious going back to the point we talked about. I think for a petitioner to show that something was not firmly established, they would have to show lots of instances going both ways.

If there's only two or three cases, I'm not sure you can ever show not firmly is. Whatever Alabama says the law is, I would argue that is the law unless you've got a real course of dealing, which would mean a number of instances.

MR. DE LEEUW: Well I mean --

[25] JUDGE EDMONDSON: That you can find, you know, even - let's assume you had a case that was absolutely not distinguishable - but one case.

MR. DE LEEUW: Huh--huh.

JUDGE EDMONDSON: I don't know that that would do that much for you.

MR. DE LEEUW: Well, we have cited many different cases, but what happens is, and I don't criticize the State for doing this, the State will say well those cases are distinguishable because those were direct appeal cases or those cases are cases where the person had his lawyer and that's - and that's --

JUDGE EDMONDSON: If they're distinguishable, they are --

MR. DE LEEUW: - a perfectly rational thing to point out.

JUDGE EDMONDSON: - they are - right.

MR. DE LEEUW: But the point is, there are a lot of different cases that - that either hold or suggest that a petitioner who doesn't receive it personally, can receive an out of time appeal.

The reason we've focused so much on Marshall and Jenkins is because we believe those cases are factually indistinguishable and in any event, to just go back to the point I made at the outset, even the State essentially concedes this [26] and it's really

unmistakable when you read the Supreme Court decision in Marshall.

It starts out by saying, well, we're going to do a review of all these prior decisions and, in fact, it even criticizes in some ways some of the prior decisions.

JUDGE HULL: Yeah, but you know what you've got here, they had your client's case. They had your client's request for an out of time appeal and three Courts denied it, saying it's not authorized under Alabama Law, that counts for something.

MR. DE LEEUW: It does, Your Honor, but --

JUDGE HULL: As to what the Alabama Law is.

MR. DE LEEUW: That's true, but the question that they did not have to address was whether this is regularly established or regularly - firmly established or regularly followed --

JUDGE HULL: Oh, I understand that, that's a federal question anyway.

MR. DE LEEUW: That's correct and --

JUDGE HULL: That's not a State Law question and they didn't have the question.

MR. DE LEEUW: Right, and what we're pointing out is that the Court of Criminal Appeals in three different circumstances did the - did diametrically opposite things. There were other circum - other cases which are factually [27] slightly different --

JUDGE HULL: Since all this happened in 2004, I assume you cited Marshall and they didn't follow Marshall?

MR. DE LEEUW: That's correct.

JUDGE HULL: Okay.

MR. DE LEEUW: That's correct.

JUDGE HULL: Because Marshall, if you do read Marshall, it - it's no holding that --

JUDGE BARKETT: Can you --

MR. DE LEEUW: That's correct.

JUDGE HULL: Go ahead --

JUDGE BARKETT: Can you just walk me through your - your procedural argument?

You start - we start with the principle - let's just take it with exhaustion, okay?

That he exhausted, he failed to exhaust a straightforward case where there's been no appeal, we would find that he had exhausted his remedies because he had an appeal, right?

MR. DE LEEUW: He failed to exhaust, that's correct.

JUDGE BARKETT: And that - so, therefore, his claim would be procedurally barred in the Federal Courts?

MR. DE LEEUW: Correct.

JUDGE BARKETT: Okay.

[28] And you're saying that because he - we have - we look beyond the failure to appeal to get to the reason of the failure because that's part of the cause and prejudice test?

MR. DE LEEUW: Well, no, I would say, Your Honor, that, when you look - Mr. Males did proceed into the Alabama Court of Appeals and to the Alabama Supreme Court, there's no dispute about that.

The rationale of both of those Courts is we will not hear the appeal.

JUDGE BARKETT: What's - okay.

MR. DE LEEUW: And so he did - I mean one could make the - one could say he did exhaust in --

JUDGE HULL: Well, your argument is he did appeal?

MR. DE LEEUW: Well, he did - he did - he did seek to appeal but those Courts would not allow him, would not hear that appeal on its merits, it –

JUDGE HULL: So, it's not an exhaustion thing, we're back again to - but the Alabama Courts decided this case on the basis of Alabama Law, which says you cannot appeal once you've - the time has passed.

MR. DE LEEUW: That's right. So that's why it comes back to the procedural default question because that's the rule. That's the rule at issue.

Can Mr. Maples or Mr. Marshall or Mr. Jenkins –

[29] JUDGE HULL: So, it's a procedural default because Alabama denied him relief on the basis of Alabama Law.

MR. DE LEEUW: Procedural law, yes, that's correct.

JUDGE HULL: Okay.

And you're saying - and so that's how we get to the question of whether or not it was firmly established?

MR. DE LEEUW: That's correct, Your Honor.

JUDGE HULL: And there is no need for prejudice in that test, forgive me, I mean some of these tests all get very confusing?

MR. DE LEEUW: There is no - there is no need for - that's undisputed. The Supreme Court, this Court has made it clear, if the rule is not firmly established and regularly followed, then that's all that's required and that's an issue (inaudible) - de novo.

JUDGE HULL: (Interrupting) – and then what happens, the Federal Courts are obliged under your view to give it a de novo review?

MR. DE LEEUW: No. Then it's still under the Anti-terrorism and Effective Death Penalty Act. The petitioner must make out a meritorious habeas case. So he still faces all the other obstacles to a Federal Habeas Petition, it must be contrary to or clearly unreasonable application of law.

JUDGE HULL: You're talking about the merits [30] though?

MR. DE LEEUW: That's the merits, that's correct.

JUDGE HULL: And the merits being the claims that he made regarding ineffective assistance of counsel.

MR. DE LEEUW: Correct.

JUDGE HULL: And the –

MR. DE LEEUW: Those are claims pursuant to Wiggins (ph) and Williams versus Taylor, claims of failure to investigate, claims of ineffective assistance of counsel.

Again, there s a standard that - I'm not suggesting that the standard in Federal Court is de novo on the merits, but –

JUDGE HULL: What we were reviewing -- the trial, the Circuit Rule 32 Court at the trial level ruled on, denied him.

MR. DE LEEUW: Right.

JUDGE HULL: So we would be reviewing whether that was an unreasonable determination –

MR. DE LEEUW: Absolutely.

JUDGE HULL: - we just don't have any Alabama Court of Appeals or Supreme Court.

MR. DE LEEUW: That's correct.

JUDGE HULL: I have a follow-up question because I want to make sure I understand the record.

As I understand it, your client never filed a [31] Notice of Appeal and had it dismissed as untimely. So he, in all fairness, he never appealed the Circuit Court decision.

MR. DE LEEUW: What he did was he --

JUDGE HULL: And that --

MR. DE LEEUW: - he - yes, that precisely is true, but I --

JUDGE HULL: All right, but what he did, a year and a half later, he filed a motion for an out of time appeal?

MR. DE LEEUW: Actually what he did was he did two different things.

JUDGE HULL: Or a Petition for Mandamus maybe?

MR. DE LEEUW: Right. First he asked the Circuit Court to vacate and reissue its Order.

JUDGE HULL: We know that.

MR. DE LEEUW: Right.

JUDGE HUILL: That the Circuit Court wouldn't do that.

MR. DE LEEUW: The Circuit Court wouldn't do that, it wasn't clear what the right procedure to follow was as of that time.

JUDGE HULL: Huh-huh.

MR. DE LEEUW: Then Marshall - Supreme Court Marshall was decided, said you have to do it by Writ of

Mandamus. So the Writ of Mandamus was filed to the Court of [32] Criminal Appeals because that was the right procedure.

JUDGE HULL: Okay.

So I just wan to make sure in terms of for me, it's - you got two separate issues here without debating that. You've got an exhaustion.

Did he ever appeal, he never appealed. What he did was, a year and a half later, he filed a Petition for Mandamus to the Supreme Court to get an out of time appeal.

MR. DE LEEUW: Respectfully, Your Honor, I think --

JUDGE HULL: Well, what am I missing?

MR. DE LEEUW: - I think what you just said is correct on its face, but I think the method of appeal, as set forth by Alabama Law is a Writ of Mandamus. So he did appeal --

JUDGE HULL: I can - the method of appeal is to file a Notice of Appeal.

MR. DE LEEUW: Right, but --

JUDGE HULL: But when you haven't done that, you then go to the - the Petition for Mandamus --

MR. DE LEEUW: Right and --

JUDGE HULL: I frankly don't understand why the Trial Court, State Court, wouldn't go on and say, okay, I'll reenter the Order, but the State opposed that, I assume?

MR. DE LEEUW: They did and --

[33] JUDGE HULL: And the Judge says, I've ruled a year and a half ago, I'm not going to reenter the Order. The right relief is to go file a Petition for Mandamus.

MR. DE LEEUW: It wasn't a year and a half ago, we actually filed this motion --

JUDGE HULL: A year.

MR. DE LEEUW: - no, it was only a few months, but it was after the forty-two days to appeal.

JUDGE HULL: Okay.

MR. DE LEEUW: It was --

JUDGE HULL: Well, tell me that time line again.

MR. DE LEEUW: Sure. August of 2001, Mr. Maples files his Rule 32 Petition, December of 2001, the Circuit Court dismisses a Motion to Dismiss.

JUDGE HULL: But when did the Circuit Court deny it on the merits?

MR. DE LEEUW: May of 2003, so almost two years after the Rule 32 Petition --

JUDGE HULL: I got that, all right.

MR. DE LEEUW: Right.

JUDGE HULL: But then when did he file -- the Trial Court?

MR. DE LEEUW: August of 2003.

JUDGE HULL: Okay.

MR. DE LEEUW: And so what we asked --

[34] JUDGE HULL: Then he went to - after that was denied, he went to the George - I mean the Alabama Mandamus route?

MR. DE LEEUW: That's correct, Your Honor.

JUDGE HULL: And when was that?

MR. DE LEEUW: That was September of 2003, it was denied as I said, I believe it was early 2004 or late 2003, I' not sure exactly of the date and then up to the Supreme Court, which was --

JUDGE HULL: So when he went, you're saying in September 2003, they had their own Marshall?

MR. DE LEEUW: At that point - at that point, the - Mr. Maples' petition had already been denied. His time to appeal had already run.

JUDGE BARKETT: You know the problem - I'm sorry --

JUDGE HULL: Go ahead.

JUDGE BARKETT: You finished?

JUDGE HULL: Yes, go ahead.

JUDGE BARKETT: Okay, cause I think it's - you need to understand the distinction, I think you need to understand the distinction Judge Hull is drawing for purposes of responding to the question.

The Rule 32, when we're talking - we're not talking about a direct appeal, right?

[35] MR. DE LEEUW: That - well, we're talking about the only manner in which to get a direct appeal.

JUDGE BARKETT: No, I'm not talking about a direct appeal from his conviction and sentencing.

MR. DE LEEUW: Oh, I'm sorry. Yes, of course not.

JUDGE BARKETT: He had that?

MR. DE LEEUW: Right.

JUDGE BARKETT: Okay.

So what - the appeal that, I think, and she can correct me, that Judge Hull is talking about is the appeal from the denial of relief of the Rule 32. That - what happened is, you filed or you, on behalf of your client said, we got a raw deal at the trial. The lawyer was ineffective, the jury instructions were no good, you made a lot of claims.

MR. DE LEEUW: Right.

JUDGE BARKETT: The District - the Alabama Trial Court said no, I'm going to deny all of these claims. There was no appeal from the denial of those claims as opposed to a Writ of Mandamus to appeal those claims.

Is there a gap in there, I think that's the question that Judge Hull is asking.

MR. DE LEEUW: Right, and I think this comes down to the question of whether exhaustion or procedural default is the applicable rule and what I'm trying to say and maybe not [36] artfully saying is that the two boil down to the same here because Mr. Maples did the only thing he could do to exhaust his claims in Alabama State Court, which was to file a Writ of Mandamus. What the Alabama Court of Criminal Appeals said and what the Supreme Court said is, no we won't hear your appeal, we won't allow you to proceed on a Writ of Mandamus because of its standards and so in that situation, respectfully, I believe the procedural default doctrine boils down into the exhaustion doctrine --

JUDGE BARKETT: Well, what would happen if you had just filed a Notice of Appeal from the denial, a late Notice of Appeal?

MR. DE LEEUW: It would have been dismissed for -

JUDGE BARKETT: Because it was late.

MR. DE LEEUW: - untimely.

JUDGE BARKETT: So you had to ask for permission to appeal.

MR. DE LEEUW: Correct.

JUDGE BARKETT: And that's really what you're doing here, asking for permission to appeal by way of a Writ of Mandamus?

MR. DE LEEUW: That's exactly what we did with the Court of Criminal Appeals and with the Supreme Court and then, and I know I –

[37] JUDGE BARKETT: And they all said no, you can't appeal, you - we're denying you permission to appeal because we have - you all received notice. There's no reason why you didn't file within the thirty-two - forty-two days, whatever it is.

MR. DE LEEUW: That was the rationale of at least the Court of Criminal Appeals, we don't know about the Supreme Court.

JUDGE BARKETT: And there is no case that says this is excusable or - other than the ones we've been discussing?

MR. DE LEEUW: Well, there are. I think there's - we've set forth why there's cause and prejudice for this, I haven't gotten to that here.

Under some case laws particularly this Court's decision in - I should mention it, this Court's decision in Dornbush (ph) and Roberts versus Sutton (ph).

This Court said - excuse me, Dorman (ph), not Dornbush, the cause and prejudice doctrine focuses on procedural missteps by a petitioner or his counsel, whether committed intentionally, inadvertently or negligently, that's the Dornbush case.

So that's the cause and prejudice argument, of course, that's just a Federal Law requirement or hurdling, so, therefore, the Alabama Courts never addressed that and I know I haven't [38] addressed, and I know - I see my time is over.

JUDGE EDMONDSON: Yeah, your time is very much over, but the Court's been asking a lot of questions.

I would ask you though to wind up because I think the State ought to be heard while we're still alert enough to hear the State.

MR. DE LEEUW: I think that would be fair, yes, Your Honor.

JUDGE EDMONDSON: Are you done?

MR. DE LEEUW: Oh, I'm sorry, I'm sorry. I thought you had a question t. wind up.

JUDGE EDMONDSON: One more question.

JUDGE HULL: Well, I want to just ask you one quick question pertaining to the jury argument, the jury instruction argument.

Is it your argument that the Judge should have given the lesser included offense instruction on manslaughter?

MR. DE LEEUW: Yes, Your Honor.

JUDGE HULL: Okay.

MR. DE LEEUW: Along with an instruction on intoxication so that the jury would understand –

JUDGE HULL: But am I also correct that your client, during the trial, maintained that he was not intoxicated?

MR. DE LEEUW: That's correct and so the argument [39] that's been framed by the parties' briefs is whether the Beck (ph) Rule applies even if the arguments from - at the Trial Court level - excuse me, the theory of the defense is inconsistent.

Respectfully we believe there is no requirement, Beck is really a threshold question of what due process requires and we respectfully believe that –

JUDGE HULL: But that's when the evidence supports it. I mean --

MR. DE LEEUW: Well --

JUDGE HULL: - that clearly says you can have an instruction if the evidence supports it.

MR. DE LEEUW: Oh, absolutely and we don't --

JUDGE HULL: But what evidence supports - what can you point to here that indicates that there's any evidence for either the - for the manslaughter or the intoxication?

MR. DE LEEUW: Well, there was evidence and, in fact, I don't think that's really disputed, it was substantial evidence.

In fact, the State says in its brief that Mr. Maples, this is at page four of its brief, Mr. Maples had six or seven beers by 8:00 p.m. That was only the start of the evening --

JUDGE HULL: But he - did he testify at the trial?

[40] MR. DE LEEUW: He did not, Your Honor.

JUDGE HULL: But his lawyers or somebody on his behalf said he wasn't intoxicated?

MR. DE LEEUW: He can - he had - the confession had a - he said he was not intoxicated.

The theory of the defense and this gets --

JUDGE HULL: Does the confession say how much he had had to drink?

MR. DE LEEUW: Excuse me?

JUDGE HULL: Does the confession say how much he had had to drink?

MR. DE LEEUW: No, it did not.

JUDGE HULL: Where did that --

MR. DE LEEUW: He said he had been drinking.

JUDGE HULL: - where did that evidence come in, that he had had six –

MR. DE LEEUW: Oh, it came in from other people, witnesses to Mr. Maples and the other people who were involved at that day. There's evidence that he was at the bar for another two and a half to three hours after the six or seven beers and been drinking and then somebody else said he was acting like a drunk person who would - would act out when they get too much in them and –

JUDGE HULL: And what is the manslaughter charge, basically isn't it that you re more negligent than intentional?

[41] MR. DE LEEUW: No, what manslaughter under Alabama Law is that if the intent requirement cannot be found by a jury, which would be the case if - in this situation, the jury found that as a result of the intoxication, he couldn't meet the intent requirement, then manslaughter would have been the proper conviction.

So the question is whether –

JUDGE HULL: The intent, you're saying that there was sufficient evidence to refute the intent requirement because of his intoxication?

MR. DE LEEUW: That's correct.

JUDGE HULL: And the only thing you can point to is the six or seven beers and the –

MR. DE LEEUW: No. It's six or seven beers up until 8:00 p.m., then other people saw him for another three hours drinking at the bar.

JUDGE HULL: Well, we don't know how many. I mean he could have had one –

MR. DE LEEUW: Well, they said he was drinking at the bar and then some other person testified that he was acting like a drunk person.

There was also evidence of drug use and also there was evidence that when the people discovered the scene, they thought that somebody was passed out.

Just to wrap up, Your Honor, and I apologize. [42] We didn't address the waiver argument and respectfully, we've addressed this quite at length in our brief.

Fundamentally the State said, told the Alabama Supreme Court --

JUDGE EDMONDSON: No, don't start on a new issue.

MR. DE LEEUW: Sure, okay.

JUDGE EDMONDSON: You've gone, you know, fourteen minutes over, we have not heard from the State.

If my sisters have a question for you, you can have some more time, otherwise, let's hear from the State.

Are there more questions?

JUDGE HULL: I'll ask after during the rebuttal about the waiver.

JUDGE EDMONDSON: Are there more questions, Judge Hull?

MR. DE LEEUW: Thank you very much, Your Honor.

JUDGE EDMONDSON: Thank you very much.

Mr. Maze, would you come around and speak on behalf of Commissioner Allen?

MR. MAZE: May it please the Court, my name is Corey Maze and I represent Richard Allen and I'd like to start by clearing up, if I can, what Alabama Law is

concerning appeals and out of time appeals and the law is very clear and this is in civil and criminal cases under Rules two and four, you have [43] forty-two days to file a Notice of Appeal and if you don't, you are out. It's a jurisdictional rule that's followed in every case. It doesn't matter again if it's criminal or civil.

What Rule 32.1(F) is and again, as Judge Hull pointed out, that began in 2005, before that it was case law. What those rules are are they are an acknowledgment. As Judge Barkett called it, a permission.

It is asking for permission to file an appeal outside the forty-two day window, which is what we're talking about here, but that permission is limited to very limited circumstances.

As we've talked about in the briefs, case law has shown and again, the point that Judge Hull was making out, this is not, this didn't start with Marshall, it started well before Marshall and I have to take an exception to what Mr. DeLeeuw said about my brief.

I never said that the case law in Marshall set forth the guidelines. Specifically if you look at the brief, I said that the Court has established guidelines and I cite Marshall and it said it was quoting cases from in the early nineties.

JUDGE HULL: Can I get you to just finish the thought you started –

MR. MAZE: Sure.

JUDGE HULL: - which was –

[44] MR. MAZE: I apologize.

JUDGE HULL: No, no, no. Permission was limited to certain circumstances which are –

MR. MAZE: Yes.

JUDGE HULL: - and what would be those circumstances?

MR. MAZE: There are two.

The first is if you failed to appeal on direct appeal, you failed to file your direct appeal within forty-two days and the fault lies with your attorney and the reason for that exception is is on direct appeal you still have a Constitutional Right to effective assistance of counsel and several of the cases cited by Mr. DeLeeuw in their brief too exactly, fall under that category.

The other category, the one that falls for Rule 32 petitioners is when a Rule 32 petitioner is not personally served and he has been deemed served. The Clerk has assumed a duty of serving.

In every case in which Mr. DeLeeuw has cited in his brief, those cases are cases in which the Rule 32 petitioner was not represented by counsel, he was acting pro se and thus, the Clerk, under Alabama Law, specifically Rule 34, has a duty to serve the petitioner, because he is acting as his own attorney.

JUDGE EDMONDSON: When I thought that – in [45] Marshall, at least, this man had counsel –

MR. MAZE: Yes.

JUDGE EDMONDSON: Am I mistaken about that?

MR. MAZE: That was my next sentence.

JUDGE EDMONDSON: Okay.

MR. MAZE: The one exception, or what would seem to be an exception would be Marshall. However, what the Court hasn't seen is the actual facts of Marshall.

I went back and looked at the record and went back and looked at the case action summary. If you'll take

judicial notice of the actual Appellate record in Marshall, Marshall filed his petition in April of 1998 on his own.

JUDGE EDMONDSON: Let me say I - I'm not sure we can take judicial notice --

MR. MAZE: Okay.

JUDGE EDMONDSON: - of State - of State proceeding - we can take judicial notice of federal --

MR. MAZE: Correct.

JUDGE EDMONDSON: - proceedings.

But I don't know about State proceedings.

MR. MAZE: Well, I can tell you - first of all, I start with what you can tell from the opinion itself, which you can take notice of.

In the opinion in Marshall, the very short Court of Criminal Appeals' opinion says that he was not only [46] represented by counsel, but also been representing himself. He had filed motions and pleadings on his own before the petition was dismissed. He also filed his own pro se motions after the petition was dismissed.

In fact, if you'll look at the appeal, he represented himself pro se. He filed his Notice of Appeal pro se, he wrote his briefs pro se in the Appellate Court.

Now, to the extent that I may answer the question of what the record shows and Chief Judge, if this is improper, you can stop me. I can tell you what the Court record. shows.

JUDGE EDMONDSON: Well, I think the thing we have to focus on and you know, one - I'm inclined, like you tell us whatever you want to, but you need to understand that at the end of the day if we can't take judicial notice of it, we can't.

MR. MAZE: Right.

JUDGE EDMONDSON: And I am troubled about taking judicial notice of State Court records.

MR. MAZE: Understood.

JUDGE EDMONDSON: But to get the story straight --

MR. MAZE: Yes, sir.

JUDGE EDMONDSON: - in full context and so forth, you can tell me whatever you want to.

JUDGE HULL: But before you do that, can you just [47] tell us from the base of the opinion.

Let's say if I only look at Marshall.

MR. MAZE: Right.

JUDGE HULL: Why is Marshall not like this case?

MR. MAZE: Marshall is not like this case because the Clerk assumed the duty of serving Marshall in prison and the reason was is because Marshall had been making his own pro se filings to the Court throughout the Circuit Court proceedings in Rule 32.

And again, you can see that, not only because the Marshall opinion says so, but you can also notice that Mr. Marshall filed his own pro se Notice of Appeal and actually litigated the appeal pro se and filed the pro se petition trying to get the out of time appeal.

JUDGE EDMONDSON: And the opinion, on its face, says that serve - that Mr. Marshall had been served at various times by the Court directly.

MR. MAZE: Actually you - to find that, you look at the Maples' opinion, the actual opinion that we're looking at here.

As Judge Hull had pointed out, Marshall had already come out by the time that Cory Maples' case came up and, in fact, they argued Marshall in the

Maples' case as one that's factually indistinguishable and the Court, in the Maples' decision said no, they are different and the reason is is [48] because Mr. Marshall had been receiving notice from the Clerk because Mr. Marshall had been filing things pro se, which is different than what Mr. Maples had been doing.

JUDGE BARKETT: Well, but is that what the – I know that's what the District Court said, but is that what - is that, in fact, what the Maples' opinion - I mean sorry, what the Marshall opinion says?

MR. MAZE: I'm - which Marshall - there were two Marshall opinions, one was -

JUDGE HULL: I think she means Maples' opinion. Is that truly what Maples said?

JUDGE BARKETT: No, no, no.

JUDGE HULL: Oh, okay.

JUDGE BARKETT: I don't care what Maples says because Maples is just a Judge analyzing Marshall, which we're going to have to do ourselves anyway.

What I want is know is if Marshall, in your view, says it?

JUDGE HULL: Maybe I was wrong.

MR. MAZE: I've got Marshall –

JUDGE HULL: I thought you were talking Maples in the Alabama Court, Maples.

MR. MAZE: My understanding is Judge Barkett is asking whether or not the original Marshall opinion in the Court of Criminal Appeals mentions that he was acting pro se.

[49] JUDGE BARKETT: And that the Clerk assumed the duty of serving him.

Isn't that the point you're trying to make –

MR. MAZE: Yes, in fact --

JUDGE BARKETT: - as a distinguishing factor?

MR. MAZE: I'll read the quote to you.

JUDGE BARKETT: All right.

MR. MAZE: And this is from Marshall v State, 884-SO2898(?), 2002.

Nothing in the Circuit Court's Order indicates the Circuit Court ever notified Marshall of the dismissal of his first Rule 32 petition. As for the, in quotations, numerous pro se motions and pleadings, Marshall contends that, while it is true he continued to file pro se motions and pleadings, those motions and pleadings were to request information on the status of his first Rule 32 petition because he had no idea that his first Rule 32 petition had been dismissed because Marshall has alleged that he never received a copy of the Order dismissing his first Rule 32 petition, we conclude that Marshall was not informed of the dismissal of his 32 petition.

[50] So the Marshall opinion itself mentions the fact that he had filed numerous pro se pleadings in the Circuit Court level and yet even though he was filing pro se motions and pleadings, the Clerk never served him a copy of the Order of Dismissal.

So it was in the Marshall opinion itself and then when Maples came along two years later, they mentioned that fact as the distinguishing factor between Marshall and Maples and again, it falls right in line with what I was saying to the Chief Judge earlier about what the exceptions are.

The second exception, or the second time you get permission is when the Clerk has assumed a duty to file - to serve the petitioner himself in prison and in

Marshall the Clerk had been filing - had been serving the person in prison because he was the one filing all of the motions and pleadings pro se from prison.

JUDGE HULL: Can I ask you sort of a different question?

MR. MAZE: Yes.

JUDGE HULL: The - you indicated the first circumstance was if you failed to file a direct appeal because the lawyer failed to do something that he should have done in filing a Notice of Appeal for example, because he was - because the defendant was entitled to the assistance of counsel through the Appellate - through the direct appeal process –

MR. MAZE: Correct.

JUDGE HULL: - is that right?

MR. MAZE: Yes.

JUDGE HULL: In Florida, we lawyers are ordered for collateral - collateral proceedings and so - but [51] statutorily, not constitutionally and I wondered, is it the same in Alabama, I mean –

MR. MAZE: As far as post-conviction counsel?

JUDGE HULL: Yes.

MR. MAZE: In post-conviction counsel in Alabama, again, as the Court knows, there's no Constitutional Right.

JUDGE HULL: I understand that.

MR. MAZE: The practice tends to be if you're a non-capital petitioner, someone who is not on death row, you file pro se and typically they have what we call jailhouse attorneys, people –

JUDGE HULL: No, no, no, but there is no rule or statutory provision or common law rule or any kind of

rule in Alabama that provides a lawyer for post-conviction or collateral proceedings?

MR. MAZE: No, there is not.

JUDGE HULL: Like a Rule 32?

MR. MAZE: No, its all come down to practice, practice is as in non-capital cases, petitioners act pro se and usually get the help of someone in prison who we usually call jailhouse attorneys.

In capital cases, such as this one and you - and this Court has seen many times, what typically happens is a local attorney, such as this case, takes the case and then you will have outside attorneys, either from a large law firm in an [52] outside state, or usually an anti-death penalty group, such as the Equal Justice Initiative out of Montgomery or here, you have the Southern Center for Human Rights, will come in as out of state counsel and that's why you see the distinction in the cases.

All of the cases the petitioner cites are all non-capital cases and those arise because those persons don't have attorneys. They are acting pro se and in those cases, the Court has recognized that because they're acting pro se, the Clerk must serve them under Rule 34 and when the Clerk does not serve them, it is a procedural due process violation and they give them the out of time.

But in a case such as this where you have an Alabama attorney and New York law firm attorneys, all of whom are receiving notice under Alabama's Rule 34, they're the only parties to receive notice. The defendant/petitioner does not receive notice under Alabama Law unless it is notice of a hearing in which he is required to be there.

JUDGE HULL: Can I just walk you through the same way I tried to walk counsel through, your –

MR. MAZE: Yes.

JUDGE HULL: - your procedural argument to make sure I have it straight here.

He did not exhaust his State remedies because he failed to appeal the Rule 32 denial of relief, is that right?

[53] MR. MAZE: Correct.

JUDGE HULL: Do you start with that?

MR. MAZE: The best way to say it is, he did not exhaust his remedies in the State Court because under Rules two and four, he did not file a Notice of Appeal within forty-two days.

JUDGE HULL: Well then, how do you get to this business of he was denied permission to - he - he didn't –

MR. MAZE: You –

JUDGE HULL: - he didn't appeal because of this situation.

MR. MAZE: You have this kind of back door where you have procedural default as part of exhaustion.

JUDGE HULL: Okay.

MR. MAZE: Because the question is, it's undisputed he never filed a Notice of Appeal.

JUDGE HULL: Right.

MR. MAZE: The question would be, if you sent this case back, do we know what would happen and what we know would happen is, he would currently file a Rule 32.1(F) petition which seeks permission to file an out of time appeal and we know that it would be denied because he filed the Mandamus Petition, which is the way that you used to do 32.1(F).

JUDGE HULL: So you agree with counsel that the procedural way to lay this out is number one, he didn't file a [54] Notice of Appeal. He argues that he was - he had reason not to file because he was never notified and then we review the State Court rulings which say you don't get relief on that ground because Alabama Law, not Federal Law, requires permission to appeal only in these instances and this isn't one of those instances.

Is that what your argument would be?

MR. MAZE: I agree procedurally and disagree on the merits.

I agree procedurally in that you look at the fact that he did not file the Notice of Appeal and if it went back, we can tell what Alabama Law would say as to whether or not he would get permission and that's --

JUDGE HULL: Well, we already know that though because --

MR. MAZE: Correct.

JUDGE HULL: - the Alabama Laws have already acted on that.

MR. MAZE: Yes, and that's why you get into the question of whether or not those laws are firm, whether they're firmly established and regularly followed because if they are, then this Court can rule from this proceeding.

JUDGE HULL: I see. You're saying - I see.

Well, let me try this again because I want to make sure I have it straight.

[55] You're saying that we would be obliged, when he says, yes, I didn't appeal, but I didn't appeal because Alabama prevented me from appealing. We would then say, well, assuming we would send it back, then to

determine whether or not Alabama prevented you from appealing, yes, Alabama prevented you from appealing but it's because of this Alabama rule.

Is that the way you see this procedurally?

MR. MAZE: Yes, that is the way I see this case.

JUDGE HULL: Okay.

MR. MAZE: And again, it's –

JUDGE HULL: So we don't ever have to worry under your view about cause and prejudice in the traditional procedural default context?

MR. MAZE: Well, I'm not saying you don't have to worry about it. I mean –

JUDGE HULL: Well, I mean we don't have to - how would prejudice come into play in that analysis –

MR. MAZE: I don't think you would be able to get to prejudice simply because there hasn't been a - there's not been an exhaustion of the claims to determine whether or not he was prejudiced that he couldn't bring them in District Court, but the good thing about this particular case is cause and prejudice is conjunctive. You have to show both and the Supreme Court and this Circuit is very clear that you can't have cause established by the ineffective assistance of post-conviction [56] counsel and at least to me, it's very clear that the fault in not filing a Notice of Appeal within forty-two days lies with post-conviction counsel.

It lies with Alabama counsel for opening the letter and Order and not filing a Notice of Appeal or calling the New York attorneys and it also falls within New York –

JUDGE HULL: Was anything done about that, I mean is there any grievances filed against this lawyer?

MR. MAZE: Not to my knowledge.

Again, we would not be the one filing, I mean - I guess we could, but to me, that would be the petitioner or his family.

Again, if you'll remember, the State, our attorney, is the one that called --

JUDGE HULL: I know.

MR. MAZE: - called this knowledge to the petitioner and his family and we also told him how he could find different attorneys if he wanted someone to represent him in habeas.

We simply wanted to make sure that he filed his Habeas Petition on time.

JUDGE HULL: Well, then what about their argument about judicial estoppel? What about your representation in the brief that says, he can still argue this in federal habeas?

MR. MAZE: Well and again, we didn't use the [57] words he couldn't argue it. What you have to understand is where this occurred.

He had already lost in the Trial Court, whether he could get an out of time appeal. He had already lost on the merits in the Court of Criminal Appeals as to whether he could get an out of time appeal and in his - his Mandamus petition to the Alabama Supreme Court, he opened by saying, you have - basically you have to give me an out of time appeal or I will be executed despite having these valid claims and --

JUDGE HULL: Why isn't that true?

MR. MAZE: Why isn't that true?

JUDGE HULL: Why - the part about valid claims, I don't know --

MR. MAZE: Right.

JUDGE HULL: - cause we don't know about the valid claim, but why isn't it true to say I will be executed despite no one ever having looked at the merits of these valid claims?

MR. MAZE: Well, it's not true –

JUDGE HULL: Allegedly valid claims, I don't know if they're valid or not.

MR. MAZE: - it's not true in the facts of this case because the Circuit Court actually did.

The Circuit Court issued an opinion denying his claim.

[58] JUDGE HULL: You mean the 32, his Rule 32?

MR. MAZE: Yes, Judge Thompson, Judge Glenn Thompson, the 32 Court.

JUDGE HULL: I thought he just denied him for failure to state a cause of action.

MR. MAZE: Again, I don't have the opinion in front of me, so I honestly can't give you a good answer on that.

JUDGE HULL: Well, assume that he denied him because he failed to assert a cause of action when clearly if you allege ineffective assistance of counsel for failing to investigate and present mitigating evidence in a death penalty case, that –

MR. MAZE: Okay.

I will –

JUDGE HULL: - that theoretically states a cause of action, that can't be denied on that basis, can it?

MR. MAZE: Theoretically let's say that Judge Thompson did not rule on the merits and thus, the Court of Criminal Appeals, nor the Supreme Court ruled on the merits, it is the still the fault of post-

conviction counsel that these claims were not looked at on the merits.

They could have raised these things on appeal to the Alabama Court of Criminal Appeals. If Judge Thompson had gotten rid of them on some procedural or summary dismissal reason, they could have appealed to the Alabama Court of [59] Criminal Appeals and didn't.

JUDGE HULL: But they couldn't because they were out of time.

MR. MAZE: Again, out of their own fault.

JUDGE HULL: I know, but why should the - so what is wrong with their statement that it's because of a lawyer's fault somebody's being executed because of the lawyer's negligence without anybody ever having looked at the merits of his claim.

I don't –

MR. MAZE: Factually that is a true statement.

JUDGE HULL: That's correct.

MR. MAZE: The problem is is under the Constitution, you have no right to effective assistance of post-conviction counsel.

JUDGE HULL: But the question then becomes you then said, supposedly, I don't mean you, you, I mean you Alabama --

MR. MAZE: Right, Mr. Haus (ph).

JUDGE HULL: Said that's not true because they are going to be permitted to argue this on - in the federal habeas.

MR. MAZE: The statement was, and again, you have to remember, this is on page 22, footnote 4, in a section entitled you don't - basically you don't treat

someone [60] differently because it's a death penalty case.

What Mr. Maples was saying, this is a death penalty case, treat it different because I'm about to be executed if you don't.

JUDGE HULL: Well --

MR. MAZE: And the point simply was, you can still - you're not about to be executed because you have already filed this Habeas Petition, and at this point the Habeas Petition had already been filed and the statement simply was, again in a footnote, he may present these claims to the Federal Courts, which is a true statement. He has presented them --

JUDGE BARKETT: But he can't, he can't because he didn't exhaust.

MR. MAZE: He can --

JUDGE BARKETT: In the State Court.

Yeah, sure, he can write them down on a piece of paper, but he knows and you know and everybody knows that the claims would not be credited, would not be looked at, would not be reviewed because he couldn't file his out of time appeal.

MR. MAZE: Unless as Judge Blackburn (ph) pointed out, he still had the opportunity to prove either cause and prejudice or fundamental miscarriage of justice. He can still present the claims as long as he can overcome his post-conviction counsel's ineffectiveness through cause and prejudice or fundamental miscarriage of justice and the point is, he [61] cannot do that.

So again, it may --

JUDGE BARKETT: He cannot do that on the merits you mean? Is that what you're --

MR. MAZE: You can - you can get to the merits of an otherwise unexhausted claim if you can show either cause or prejudice or a fundamental miscarriage of justice --

JUDGE BARKETT: (Interrupting) - but you just --

MR. MAZE: - innocence.

JUDGE BARKETT: But you just got finished telling me that cause won't work because it was due to his lawyer's mistake.

MR. MAZE: Correct.

JUDGE BARKETT: Which wouldn't apply if the out of time appeal had been - had been effectuated.

MR. MAZE: Again, the cause and prejudice simply comes from the fact of his - it is his post-conviction counsel's fault.

JUDGE BARKETT: Exactly --

MR. MAZE: I understand why this is troubling, Judge Barkett, but -

JUDGE BARKETT: Yeah, I know. I mean you've got to understand why it's troubling.

MR. MAZE: I do, but --

[62] JUDGE BARKETT: We're going to execute somebody because a lawyer screwed up. That seems hardly --

JUDGE EDMONDSON: No, no, no, no.

JUDGE BARKETT: No?

JUDGE EDMONDSON: I would suggest we're going to execute someone because he's been convicted and the - on direct appeal, it's been affirmed and on collateral relief, he's been barred in certain ways, not because - I don't think anyone in this country is executed because their lawyer screwed up.

MR. DE LEEUW: Yes, I would agree with that.

JUDGE BARKETT: Well, but that's - that ignores the fact that the allegations in the Rule 32 petition and in the Habeas Petition that I presume would have been filed here, have to do with allegations that he didn't get a fair trial, that his lawyer was constitutionally ineffective for failing to present mitigating evidence which could have precluded the death penalty.

I don't know if these are true or they're not true or valid or not valid.

MR. MAZE: Right.

JUDGE BARKETT: But the bottom line is that nobody's going to look at those because the lawyer made a - was negligent.

MR. DE LEEUW: Correct.

JUDGE BARKETT: Not because the defendant was [63] negligent.

MR. MAZE: Again, Judge Barkett, I don't disagree with anything you've said, that's simply the law and the law is that under the Constitution if post-conviction counsel is ineffective, the petitioner is post-conviction counsel, they are one in the same and you can't rely on post-conviction counsel to establish cause and prejudice and here's why that can't be the rule under Edpaa (ph).

If under Edpaa, you said cause and prejudice for failing to exhaust can be put on the shoulders of post-conviction counsel, then you're completely taking away the State Court's ability to have the first shot at claims under State Law or - in their State post-conviction proceedings.

If here, the Sullivan and Cromwell attorneys and the Alabama attorney, if their negligence, their ineffectiveness establishes cause and prejudice here,

they have effectively taken this case out of State Court which is where Edpaa says that it has to be argued and decided and you're allowing them to bring it to Federal Court without us ever having a chance in the Alabama State Courts and that can't be the law.

JUDGE BARKETT: But you had a chance, except that you wouldn't give them the opportunity to present the case.

MR. MAZE: I would disagree with the statement that we decided we couldn't.

We have a jurisdictional rule, Alabama 2-A [64] specifically says an appeal shall be dismissed if not timely filed. The Courts had no option. We have a jurisdictional rule that says if you don't file a Notice of Appeal within forty-two days, you have to kick it out and we do that in every case.

We simply have those particular two circumstances where we give permission to go outside of the forty-two days and he doesn't fit within either of those in this case.

Again, I understand the dilemma, but the law is, it is what it is and in this case, he cannot rely on his post-conviction counsel's ineffectiveness to sidestep review in the Alabama State Courts.

JUDGE BARKETT: Is there anything in this record that deals with the claims, with the merits of the claim of ineffective assistance of counsel for lack of mitigation?

MR. MAZE: No, there's not. I mean the District Court never went to the merits of the actual ineffective assistance claims and that is because the District Court ruled that they were procedurally defaulted due to the non-exhaustion. So –

JUDGE BARKETT: And the only - and the only mention of whatever that would be, would be in his petition, his Rule 32 petition?

MR. MAZE: I'm sorry. I'm not sure I understand, the only mention of what?

[65] JUDGE BARKETT: I'm just trying to get some --

JUDGE HULL: The nature of the claim.

JUDGE BARKETT: Yes.

JUDGE HULL: To know what he --

MR. MAZE: Right.

JUDGE HULL: - what he is still trying to raise would be in the Rule 32 petition.

MR. MAZE: Well, the claims are the same in the Rule 32 petition and in the Federal Habeas Petition.

If you'll actually go back and read the Habeas Petition and my Answer, we made a pretty big deal out of the fact that they simply cut and pasted their Alabama Court of Criminal Appeals' brief and put it into their Habeas Petition.

So you're seeing the exact same claims in both. So you can look either way and find out what the claims were.

JUDGE BARKETT: But the - okay.

But that's all there is is just the claims, there's no evidentiary hearing, there's no testimony by anybody, there's no affidavits of anything?

MR. MAZE: To my knowledge, that is correct. There's certainly not a hearing. My understanding in the Alabama Circuit Court, there was not a hearing, it was summarily dismissed and that's what Mr. DeLeeuw was saying earlier and I know for a fact that --

JUDGE HULL: Yeah, but let me ask you this.

[66] The State came in and moved to dismiss for failure to state a claim?

MR. MAZE: Correct.

JUDGE HULL: Then they replied.

When they replied, did they put in any affidavits or psychological evaluations or anything?

MR. MAZE: I don't have those --

JUDGE HULL: In the Circuit Court?

MR. MAZE: - I don't have those with me, in general Alabama practice, that does not happen. Generally, you can, I mean Alabama Rule 32 allows you to, but --

JUDGE HULL: But - here, they denied the Motion to Dismiss. I mean the Circuit Court first denied the Motion to Dismiss.

MR. MAZE: Right.

JUDGE HULL: I was looking for the Rule 32 Order that was done subsequent to the first one.

MR. MAZE: Right.

JUDGE HULL: Trial Court Order.

Is that - I assume that's in the record?

MR. MAZE: It's not in the excerpts that you have --

JUDGE HULL: No, okay.

MR. MAZE: - but it's in the full record that the District Court had.

[67] JUDGE HULL: Okay.

MR. MAZE: If I may, I just want to move on briefly to - Mr. DeLeeuw was talking about the manslaughter instruction and before you even get in --

JUDGE HULL: Before you do that --

MR. MAZE: Sure.

JUDGE HULL: - can you deal with the expressed waiver, why, under the Federal Case Law, this is not an expressed waiver?

MR. MAZE: Yes, there's –

JUDGE HULL: What are your best cases in that regard?

MR. MAZE: Well, instead of even going to cases, I would go straight to the rule and the rule was added in Edpaa in 1996 and it says that it has to be expressed and this Court has said it's explicit. I mean you have to say we waive the requirement of exhaustion --

JUDGE HULL: That's what I just said.

So what are your best cases interpreting that rule?

MR. MAZE: The best cases interpreting it, I guess would be the cases where they actually found expressed waiver and that would be Hills v. Washington in this Court in 2006 where the Georgia Attorney General in his brief to this Court and the quote was, was not defaulted. We asked you to [68] hold it as quote, not defaulted and remand for 2254-D analysis.

That was expressly saying we don't want you to apply the procedural fault due to non-exhaustion. We want a merit's determination.

In Dorsey (ph) v. Chapman (ph), 2001, this Court and it didn't put the quotation in there, but it said it made an explicit statement in the District Court Answer. The Answer to the Habeas Petition and in those cases, and again, this is not something that the Courts typically get into, it is an explicit statement, either that "A", we don't want to rely on the exhaustion or procedural default requirements or, "B",

we acknowledge or we accept that he did exhaust and that is clearly not what happened here.

I mean remember Edpaa, before 1996 allowed Judges to infer waiver. By simply the fact that we didn't bring it up, et cetera, and in 1996 they added this expressed requirement to make sure that it is never waived as a defense unless we explicitly say so.

JUDGE HULL: Okay.

I just wanted to know what your cases were, those were in your brief, if there was anything else that –

MR. MAZE: No, no, I actually - I did go back and look and I didn't really see anything else that I found –

JUDGE HULL: Okay.

Well, go on to the jury instruction –

[69] JUDGE BARKETT: Well, before you do that, what about judicial estoppel as a different argument?

MR. MAZE: Well again, I would say that - the easiest way to look at judicial estoppel, judicial estoppel prevents you from taking one position in a Court succeeding on that position and –

JUDGE BARKETT: No, you don't have to succeed on it.

MR. MAZE: Well, the Supreme Court in New Hampshire –

JUDGE BARKETT: There are no cases that say that.

MR. MAZE: - specifically uses the words succeeded and persuading, that's the quote in New Hampshire. In fact, the last time this Court looked at a case under judicial estoppel was 2006, Stevens (ph) v. Talbert (ph) and it wasn't a Judge on this panel, it was Judges Carnes (ph), Debina (ph) and Pryor (ph) and the

case was, it was a 1983 false arrest claim in which in the District Court, they claimed, I'm --

JUDGE BARKETT: That's all right.

Maybe it's semantics that we're talking about. I do believe you have to perhaps show some benefit or some detriment.

MR. MAZE: Right.

JUDGE BARKETT: But --

MR. MAZE: And again, they can't do that here [70] simply because they lost on he merits in the Trial Court on whether they could get an out of time appeal. They lost on the merits in the Court of Criminal Appeals on the merits. This footnote that we're talking about was never mentioned, nothing about the Habeas Petition was mentioned in either of those Courts and yet under Alabama Law, both said that he - that Maples was wrong on the merits and then you get to the Alabama Supreme Court who issues no opinion. There's absolutely no - again, I dispute that this is even mentioning anything about the procedural default or expressed - or exhaustion requirement for federal habeas purposes because, again, State Mandamus isn't controlled by 2254.

I believe Jude Blackburn is right that to make an expressed waiver of a 2254 defense, it has to be in a court that's looking at 2254, but even still, because the Alabama Supreme Court didn't even issue an opinion in that case, there's absolutely no way to say that because of this footnote, that somehow Mr. Maples lost on this claim.

In fact, if you look back to the two Courts that actually ruled on the merits, that statement, that footnote was never made and yet they both said on the merits under Alabama Law, Mr. Maples is incorrect.

JUDGE BARKETT: What about the manslaughter?

MR. MAZE: The manslaughter - before you even get to the actual facts of what happened in this case and I'll do [71] that very briefly, but you cannot give relief under Edpaa, under 2254-D because to do so, you have to say that Beck is basically square with the facts of this case.

Four times in the last three years, the U.S. Supreme Court has reversed cases granting relief under Edpaa because it was a rule of law or a set of facts that was distinguishable from the facts in front of the Court and that was Musladeen (ph), there was Langergon (ph), VanPatton (ph) and Knowles (ph) v. Merizantz (ph), which just came out a couple months ago and --

JUDGE BARKETT: Well, what does Beck hold, just --

MR. MAZE: The Beck --

JUDGE BARKETT: - straightforwardly, what does Beck require?

MR. MAZE: In 1980, Alabama, under our capital statute before it was rewritten, you could not even ask for lesser included's in a capital case. It was all or nothing is the best way to say it and they held that under due process, you cannot have a statute that goes all or nothing in a capital case.

JUDGE BARKETT: Okay.

But in this case, a lesser included instruction was given, was there not?

MR. MAZE: There were actually two different lesser included instructions given, yes. He asked for them and [72] got the ones that he asked for.

JUDGE BARKETT: Okay.

And he never requested the manslaughter one?

MR. MAZE: No. In fact, the manslaughter was the exact opposite of what he was arguing in closing, you know, we were talking - you were talking to Mr. DeLeeuw earlier about whether or not there was any evidence of intoxication. Mr. Maples' trial attorney, may I proceed? I know that my time is out.

JUDGE EDMONDSON: You're responding, you may.

MR. MAZE: Okay.

That he cross examined one of the State's witnesses, April Phillips (ph) and the page is 1913 in the record, to get her to say that he was not drunk or on drugs that night and then he called three witnesses of his own, Tatum Terry (ph), Alex Birdsong (ph), and Daniel Maples and had each of the testify on direct that Mr. Maples was neither drunk or on drugs to the point of being intoxicated to insanity, which is Alabama Law, that he was not drunk or intoxicated on drugs and then in the jury instructions, at the charge conference, he asked for the lesser included's of intentional murder and theft to get rid of the capital murder during a robbery and then during closing argument, he specifically argued to the jury that under Mr. Maples' statement, again, the question was earlier, did he testify, he did not, but his statement to police was video taped [73] and on the video tape, he said I was not on drugs, I was not intoxicated at the time of the murder and the defense attorney argued that that was true in closing argument and said that he was not intoxicated.

In fact, as far as drugs go, they found a can, a Coke can, which people argue are used in crack cocaine and

he specifically argued that there were no fingerprints found on that can that could link Mr. Maples to using it.

So his entire strategy –

JUDGE HULL: What were the two lesser included instructions?

You said intentional murder and what was the other one though, I didn't –

MR. MAZE: Theft.

JUDGE HULL: Theft?

MR. MAZE: Theft, right. It - theft is –

JUDGE HULL: How is that a lesser included than murder?

MR. MAZE: It's a lesser of robbery. One of the charges –

JUDGE HULL: Okay.

So there was only one lesser included to the capital murder?

MR. MAZE: Well, there were two charges of capital murder.

[74] The first charge was capital murder because it's intentional murder of two or more persons. So you get intentional murder as a lesser of that.

Charge two was capital murder during a robbery.

JUDGE HULL: I see.

MR. MAZE: So under Charge two he got the lesser's of intentional murder –

JUDGE HULL: I see.

MR. MAZE: - and theft, because he argued it wasn't a robbery, because he didn't steal anything or take anything at the time of the murder. The theft was an afterthought. That was how he could –

JUDGE HULL: Did the - which of the two capital murders did the jury convict him of?

MR. MAZE: I believe it was on both.

JUDGE HULL: On both, okay.

MR. MAZE: Yes.

JUDGE EDMONDSON: All right.

Are there further questions?

JUDGE HULL: No, sir.

JUDGE EDMONDSON: All right.

MR. MAZE: Thank you, sir.

JUDGE EDMONDSON: Thank you very much.

There's five minutes rebuttal. Mr. DeLeeuw, do you want to come around and speak to us?

[75] MR. DE LEEUW: Thank you very much, Your Honor.

I'll just briefly go through a few of the issues that were raised during the State's response.

First of all, the question that I believe Judge Barkett asked the State was, in the Marshall, Court of Criminal Appeals decision, was there any indication, was there any recognition that the Clerk had assumed some duty because Mr. Marshall was not represented.

The answer to that is a resounding no. There was no indication in that decision at all that that was the reason why Marshall got an out of time appeal.

In fact, the only time that there's a discussion of when there's a duty or not is in the Marshall Supreme Court decision and as I've mentioned, what happened in the Marshall Supreme Court decision was that the Supreme Court was quite critical in some fashion, although it never ended up holding anything

substantively about when a time - out of time appeal is available.

It was quite critical about some previous precedent –

JUDGE EDMONDSON: Your client filed no pro se papers?

MR. DE LEEUW: That's correct, that's correct.

But there was no - the reliance on a duty of the Circuit Court Clerk just was not - did not exist in the Marshall [76] case.

So based on the decisions of those cases, those two cases are indistinguishable.

JUDGE BARKETT: But I think the point that was being made was that there's no question that there is a discussion of the fact or at least an expression of the fact that in Marshall, the defendant had filed pro se pleadings.

MR. DE LEEUW: He did file additional things.

The reason why, that's raised is because the State was arguing in Marshall, well, you should have known about this because you were filing all these pro se motions, so you should have been looking at the docket sheet and the Circuit Court rejected that and said, no, there's no obligation that he happened to - have to have looked at the docket sheet in that circumstance just because he was filing pro se motions.

But the second, point, which, I think, there was quite a lot of discussion about, I think the State - the State's counsel acknowledged that either way you get at it, whether it's through exhaustion or the procedural default doctrine, either way, you have to get to the firmly established and regularly followed rule.

Procedurally it can get quite complicated because there's this question of - you have to Writ of Mandamus and therefore, that's the bar to filing the appeal.

JUDGE BARKETT: Right, but their bottom line is [77] that there is no case that holds the way you suggest. I mean it all falls down around Marshall, is that right?

MR. DE LEEUW: Well, Marshall - we would respectfully submit that Jenkins as well --

JUDGE BARKETT: Marshall and Jenkins.

MR. DE LEEUW: And the change to the rules which again, shows that Alabama has been going through quite a progression.

JUDGE BARKETT: Okay.

It's how you view those three cases.

MR. DE LEEUW: Exactly.

JUDGE BARKETT: I don't think you all disagree about how you get there, it's just how you view those three cases.

MR. DE LEEUW: Well, I think there are other cases, but again, the State has argued these are distinguishable, they're direct appeals –

JUDGE BARKETT: Okay.

MR. DE LEEUW: - they're clear duties and so forth.

On to the waiver and the judicial estoppel argument. The State said, I think after questioning from Judge Barkett, that our statement that Mr. Maples might be executed because - and yet no Court had ever reviewed that and considered the ineffective assistant claims was correct, the State says that's correct.

[78] What the State said to the Alabama Supreme Court was, well, that's a misleading argument because Mr. Maples has filed a Federal Habeas Petition and he may present those claims to the Federal Habeas Court and we've set forth the dictionary definition of the word present.

Present means allow the Court to consider as an object of incorrect.

JUDGE BARKETT: But even under judicial estoppel which is less rigorous than ordinary estoppel, you still have to show, do you not, some benefit that the State derived from making this statement or that some detriment that you suffered.

What would there be here?

MR. DE LEEUW: Not exactly and that - I think the questioning back and forth and the answers, I'm not sure were exactly correct as - on the case law.

Under State of New Hampshire, what has to happen is that the first Court needs to accept the first - the party's argument --

JUDGE BARKETT: They --

MR. DE LEEUW: - and it has to - not the statement itself --

JUDGE BARKETT: No, no, no, the argument --

MR. DE LEEUW: - it has to rule in favor of the first party.

So, in other words, all that needs to happen is [79] that the Alabama Supreme Court rules that, in fact, Mr. Maples should not get an out of time appeal. That's what the State of New Hampshire holds. The State of New Hampshire holds that there must be a - an earlier position succeeds and this Court and the Alabama Supreme Court have both addressed the question of

whether there needs to be some sort of detrimental reliance, whether there needs to be a requirement that the Court ruled because of that statement and both these Courts, in the Burns (ph) case and in the ex parte First Alabama case said there doesn't need to be reliance and the reason for that is pretty clear, because the point here is to try to make sure that - neutral observers will take a look at what's going on in the judicial system and say, we can rely on that and what do you have here, you have the State telling the Alabama Supreme Court, you don't need to allow an out of time appeal because Mr. Maples can present his claims in Federal Court and as soon as we get to Federal Court, the State turns around and says, no, Mr. Maples can't present his claims.

Now, put aside what Mr. Maples thinks about that progression of facts, look at an un - you know, a neutral unaffiliated observer would say, what the State of Alabama is saying Mr. Maples, ineffective assistance of counsel claims can be presented in Federal Court and then as soon as you get to Federal Court, he says they can't, which goes back to the central premise of what's being argued on appeal here.

[80] We are not arguing that the Federal Habeas Petition ought to be granted on the ineffective assistance of counsel claims.

Mr. Maples is only asking that as a result of these facts that we've all - we've all discussed, that his claims for ineffective assistance of counsel can be heard once by a Court.

There's a strict standard under the Habeas Statutes, the Anti-terrorism and Effective Death Penalty Act has a high standard for succeeding on the merits of a claim, but that's all that Mr. Maples is

asking, what most every other petitioner in Federal Court gets, which is some Court to look at his claims and see whether they're meritorious under the standards of Federal Habeas Petition, Mr. Maples has been deprived of that and so it beseeches this Court to grant him that right.

Thank you, Your Honor.

JUDGE EDMONDSON: All right.

Got any further questions?

JUDGE BARKETT: No.

JUDGE EDMONDSON: We thank you all for coming.

MR. DE LEEUW: Thank you very much, Your Honor.

JUDGE EDMONDSON: The Court will be in recess.

COURT CLERK: All rise.

(PROCEEDINGS CONCLUDED.)

REPORTER'S CERTIFICATE

I, Scott A. Huseby, Court Reporter, do hereby certify that this transcript is a true and accurate record of the electronically recorded proceedings, transcribed under my direction this the 2nd day of February, 2010.

/s/Scott A. Huseby

SCOTT A. HUSEBY, CLR

Certified LiveNote Reporter

RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR

Adopted by the Board of Commissioners of the Alabama State Bar and approved by the Supreme Court of Alabama

Revised: August 1998

RULE VII
ADMISSION OF FOREIGN ATTORNEYS PRO HAC VICE

A. Appearance of Foreign Attorneys Pro Hac Vice Permitted; Exceptions. An attorney or counselor-at-law who is not licensed in good standing to practice law in Alabama, but who is currently a member in good standing of the bar of another state, the District of Columbia, or other United States jurisdiction (hereinafter called a foreign attorney) and who is of good moral character and who is familiar with the ethics, principles, practices, customs, and usages of the legal profession in the State of Alabama, may appear as counsel pro hac vice in a particular case before any court or administrative agency in the State of Alabama upon compliance with this rule (for purposes of this rule, an administrative agency is any board, bureau, commission, department, hearing officer, or other administrative office or unit of the state). However, except as provided in Section I below, no foreign attorney is eligible to appear as counsel pursuant to this rule if that attorney (a) is a resident of the State of Alabama, or (b) is regularly employed in the State of Alabama, or (c) is regularly

engaged in substantial business, professional, or other activities in the State of Alabama.

B. Foreign Attorney Appearing Pro Hac Vice Subject to Local Jurisdiction. A foreign attorney appearing as counsel pro hac vice before any court or administrative agency of the State of Alabama shall be subject to the jurisdiction of the courts of this state in any matter arising out of the attorney's conduct in such proceedings. The attorney shall be familiar with and shall comply with the standards of professional conduct required of members of the Alabama State Bar and shall be subject to the disciplinary jurisdiction of the courts of this state, of the disciplinary tribunals of the Alabama State Bar, and of the Board of Commissioners of the Alabama State Bar with respect to any acts occurring during the course of the attorney's appearance. The judge, hearing officer, or agency may examine the foreign attorney to satisfy the court, hearing officer, or agency that the foreign attorney is aware of and will observe the ethical standards required of attorneys in this state. If the judge, hearing officer, or agency is not satisfied that the foreign attorney is reputable and will observe the ethical standards required of attorneys in this state, the court, hearing officer, or agency may in its discretion revoke the authority of the attorney to appear.

C. Association of Local Counsel. No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the Alabama State Bar (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings,

and other documents filed in the cause. Local counsel shall personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court, unless specifically excused from such appearance by the court or administrative agency. Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

D. **Verified Application.** In order to appear as counsel before a court or administrative agency in this state, a foreign attorney shall file with the court or agency where the cause is pending a verified application for admission to practice (a form for such an application follows this rule), together with proof of service by mail, in accordance with the Alabama Rules of Civil Procedure, of a copy of the application and of the notice of hearing upon the Alabama State Bar at its Montgomery, Alabama, office. In the event application is made before any defendant in an action has appeared, a copy of the application and notice must also be served upon such defendant. The copy of the application and the notice of hearing served upon the Alabama State Bar shall be accompanied by a nonrefundable $100 filing fee. The notice of hearing shall be given at least 21 days before the time designated for the hearing, unless the court or agency has prescribed a shorter period. In criminal cases involving indigent defendants, the court or agency may waive the filing fee and notice requirements for good cause shown.

Upon receipt of any application for admission, the Alabama State Bar shall file with the court or agency and serve upon all counsel of record, or upon any parties not represented by counsel, and upon the applicant, before the scheduled hearing date, a statement indicating whether the applicant or other attorney members of the firm with which he or she is associated have previously made any application for admission, the date of such application, and whether it was granted. No application shall be granted before this statement of the Alabama State Bar has been filed with the court or agency. Once this statement is received, the court or administrative agency shall issue an order granting or denying the application. A copy of each order granting or denying an application shall be mailed by the local counsel to the Alabama State Bar at its Montgomery, Alabama, office.

E. Form of Application. The application required by this Rule shall be on a form approved by the Alabama State Bar and the Supreme Court (a form so approved for such application follows this rule) and shall state: (1) the applicant's residence; (2) the court or courts to which the applicant has been admitted to practice and the date or dates of admission; (3) that the applicant is a member in good standing of such court or courts (with such exceptions as may be the case); (4) that the applicant is not currently suspended or disbarred from practice in any court (stating exceptions); (5) the title of the court and cause in which the applicant or any member of the firm of attorneys with which the applicant is associated has filed an application for admission as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted; (6) the name,

address, and telephone number of local counsel who is attorney of record; and (7) the name of each party and the name and address of counsel of record who appeared for that party. The applicant shall also provide such other information and statements as may be called for by the form approved by the Alabama State Bar and the Supreme Court.

Before any application is granted, local counsel must appear as attorney of record in the particular cause or must consent in writing to the association.

The granting or denial of an application for admission as counsel pursuant to this rule is discretionary with the court or administrative agency before which the application is made. Absent special circumstances, repeated appearances by any person or firm of attorneys pursuant to this rule shall be cause for denial of an application. In any case where the foreign attorney has entered an appearance pro hac vice in 5 cases within the preceding 12 months, the court or administrative agency shall examine the foreign attorney to establish good cause for according such privilege, including facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include, but are not limited to, the following: (1) a showing that the cause involves a complex field of law in which the foreign attorney is a specialist, (2) a long-standing attorney-client relation-ship, (3) lack of local counsel with expertise in the field involved, (4) the existence of legal questions involving the law of a jurisdiction in which the foreign attorney regularly practices, or (5) the need for extensive discovery proceedings in the foreign jurisdiction.

In the event the action or cause is transferred from one court or administrative agency of this state to another or in the event the action is appealed, a foreign attorney authorized to appear in the cause while it was pending before the first court or administrative agency shall be deemed admitted to the court or agency to which the cause has been transferred or appealed; provided, however, that the court or agency having jurisdiction over the transferred or appealed cause may, for good cause, revoke the authority of the foreign attorney to appear. (See Section F, "Appearance Before an Appellate Court.")

F. **Appearance Before an Appellate Court.**

(1) Upon filing an appearance in a matter in an appellate court of this state (i.e., the Supreme Court, the Court of Civil Appeals, or the Court of Criminal Appeals), a foreign attorney previously admitted to appear in the matter before a trial court or administrative agency shall furnish to the clerk of the appellate court proof of the previous admission, along with a certification by the foreign attorney that the admission has not been rescinded.

(2) If the appearance before the appellate court is to be the foreign attorney's first appearance in the matter, then admission shall be by motion to the appellate court, and the motion shall be supported by a certificate of good standing from the bar of another United States jurisdiction.

(3) Any foreign attorney moving for admission to appear before an appellate court of this state shall be required to associate local counsel, whose name, address, and telephone number shall be included in the foreign attorney's motion for admission. Although local counsel is not required to be an active participant in

the matter, the foreign attorney is required, in the motion for admission pro hac vice, or in the initial filing in the appellate court (in the event the foreign attorney has been previously admitted in the matter by a trial court or an administrative agency), to designate which attorney shall be lead counsel for purposes of service in the manner prescribed in the Alabama Rules of Appellate Procedure. On proper motion, and for good cause shown, the appellate court may waive the required association of local counsel.

(4) A foreign attorney admitted to practice in a matter before the Court of Criminal Appeals or the Court of Civil Appeals is deemed admitted in any subsequent proceedings in that same matter before the Supreme Court.

(5) At any time, for good cause shown, and on the application of any party, the previous order admitting the foreign attorney to practice in a matter may be reviewed and/or rescinded, without hearing, by the appellate court before which the matter is then pending.

G. Quarterly Report. The executive director of the Alabama State Bar shall prepare a quarterly report listing all applications filed during that quarter and during the preceding 12 months and listing the names of the applicants and indicating as to each application whether the application was granted or denied. The report shall be transmitted to the clerk of each circuit and district court, each circuit and district judge, the clerk of the Supreme Court, and such other persons as the Board of Commissioners directs.

H. **Suspension or Disbarment Terminates Permission To Appear Pro Hac Vice.**

(1) Permission for a foreign attorney to appear pro hac vice under the provisions of this rule shall terminate upon that attorney's suspension or disbarment in any jurisdiction in which the foreign attorney has been admitted. The foreign attorney shall have the duty to promptly report to the court or administrative agency of this state before which the attorney is appearing any disciplinary action that has been taken against the attorney in any other jurisdiction.

(2) In the event local counsel in a particular case is suspended or disbarred from the practice of law in the State of Alabama, the foreign attorney shall, before proceeding further in the pending cause, associate new local counsel who is in good standing to practice law in the State of Alabama and shall file a verified notice thereof with the court or administrative agency of this state before which the foreign attorney is appearing.

I. **Exceptions.**

(1) Nothing in this rule shall be construed to prohibit any foreign attorney from appearing before any court or administrative agency of this state on his or her individual behalf in any civil or criminal matter.

(2) Foreign attorneys representing the United States Government shall be permitted to appear and to represent it in any matter in which it is interested, without the association of local counsel.

J. **Enforcement.**

(1) No court clerk or filing officer of any administrative agency of this state shall accept for filing any pleadings or other documents from a foreign attorney who has not complied with the requirements

of this rule. Any pleadings or other documents filed in violation hereof shall be stricken from the record upon the motion of any party or by the court or administrative agency sua sponte.

(2) The courts and administrative agencies of this state shall have the duty and authority to enforce the provisions of this rule by denying violators the right to appear. If a foreign attorney engages in professional misconduct during the course of an appearance, the judge or the hearing officer of the administrative agency before which the foreign attorney is appearing may revoke permission to appear pro hac vice and may cite the attorney for contempt. In addition, the judge or hearing officer shall refer the matter to the Disciplinary Commission of the Alabama State Bar for appropriate action.

(3) Violation of this rule is deemed to be the unlawful practice of law. The Alabama State Bar or its designated commissioners shall have the right to take appropriate action to enforce these rules under the provisions of Ala. Code 1975, § 34-3-43.

(4) The provisions of this rule shall be cumulative to all other statutes and rules related to or dealing with the unauthorized practice of law within the State of Alabama.

* * *

RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR

Adopted by the Board of Commissioners of the Alabama State Bar and approved by the Supreme Court of Alabama

Revised: June 2008

RULE VII
ADMISSION OF FOREIGN ATTORNEYS PRO HAC VICE

A. Appearance of Foreign Attorneys Pro Hac Vice Permitted; Exceptions.

An attorney or counselor-at-law who is not licensed in good standing to practice law in Alabama, but who is currently a member in good standing of the bar of another state, the District of Columbia, or other United States jurisdiction (hereinafter called a foreign attorney) and who is of good moral character and who is familiar with the ethics, principles, practices, customs, and usages of the legal profession in the State of Alabama, may appear as counsel pro hac vice in a particular case before any court or administrative agency in the State of Alabama upon compliance with this rule (for purposes of this rule, an administrative agency is any board, bureau, commission, department, hearing officer, or other administrative office or unit of the state). However, except as provided in Section I below, no foreign attorney is eligible to appear as counsel pursuant to this rule if that attorney (a) is a resident of the State of Alabama, or (b) is regularly employed in the State of Alabama, or (c) is regularly

engaged in substantial business, professional, or other activities in the State of Alabama.

For the purposes of this rule, "pro bono counsel" is a foreign attorney who will not charge a fee and who is involved in a capital case or a postconviction proceeding for an indigent criminal defendant, hereinafter referred to as a "pro bono case."

B. Foreign Attorney Appearing Pro Hac Vice Subject to Local Jurisdiction.

A foreign attorney appearing as counsel pro hac vice before any court or administrative agency of the State of Alabama shall be subject to the jurisdiction of the courts of this state in any matter arising out of the attorney's conduct in such proceedings. The attorney shall be familiar with and shall comply with the standards of professional conduct required of members of the Alabama State Bar and shall be subject to the disciplinary jurisdiction of the courts of this state, of the disciplinary tribunals of the Alabama State Bar, and of the Board of Commissioners of the Alabama State Bar with respect to any acts occurring during the course of the attorney's appearance. By applying for pro hac vice admission, a foreign attorney authorizes the Alabama State Bar to report all information whatsoever regarding any discipline imposed in this state against the attorney, whether by the Bar or any court, to all jurisdictions in which the attorney holds a license to practice law. The judge, hearing officer, or agency may examine the foreign attorney to satisfy the court, hearing officer, or agency that the foreign attorney is aware of and will observe the ethical standards required of attorneys in this state. If the judge, hearing officer, or agency is not satisfied that the foreign attorney is reputable and will observe the

ethical standards required of attorneys in this state, the court, hearing officer, or agency may in its discretion revoke the authority of the attorney to appear.

C. Association of Local Counsel.

No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the Alabama State Bar (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel shall personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court, unless specifically excused from such appearance by the court or administrative agency. Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause. Pro bono counsel need not associate local counsel, but the judge may require pro bono counsel to provide a referral letter from a local attorney.

* * *

IN THE SUPREME COURT OF ALABAMA
September 19, 2006

ORDER

IT IS ORDERED that Rule VII and Rule IX.G. (1), Rules Governing Admission to the Alabama State Bar, be amended to read in accordance with Appendices A and B, respectively;

IT IS FURTHER ORDERED that Committee Comment to the Amendment to Rule VII and the Verified Application to Practice under Rule VII of the Rules Governing Admission to the Alabama state Bar for Pro Bono Counsel be adopted to read in accordance with Appendices C and D, respectively;

IT IS FURTHER ORDERED that these amendments are effective September 19, 2006.

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule VII and Rule IX:

> "Note from the reporter of decisions: The order amending Rule VII and Rule IX.G. (1), effective September 19, 2006, and adopting the Committee Comment to Rule VII and the verified application for admission of pro bono counsel is published in that volume of Alabama Reporter that, contains Alabama cases from __ So. 2d."

Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct

copy of the. instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 19th day of Sept., 2006

s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

* * *

APPENDIX C

Committee Comment to Amendment
Effective September 19, 2006

Alabama courts have recognized that this State faces considerable challenges in providing adequate legal representation for indigent persons, particularly criminal defendants in postconviction proceedings. Ex parte Jenkins, [Ms. 1031313, April 8, 2005] __ So. 2d __ (Ala. 2005). In order to facilitate the provision of indigent defense services by foreign attorneys who volunteer to represent indigent defendants pro bono, this rule has been amended to omit certain requirements for the pro hac vice admission of pro bono counsel. In addition, the amendment authorizes the Alabama State Bar to report all information regarding any discipline imposed in the State against an attorney admitted pro hac vice to all jurisdictions in which the attorney is licensed to practice law.

* * *

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 18 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

Library of Congress
Law Library

12

CAPITAL CASE
QUESTION PRESENTED

In this capital case, the divided Eleventh Circuit held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender—Left Firm" written on an envelope. This Court granted certiorari to address the following question:

Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other courts—that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Alabama's System For Representation Of Indigent Capital Defendants 3

B. Maples's Trial Proceedings And Direct Appeal 6

C. Maples's State Post-Conviction Proceedings 9

D. Maples's Federal Habeas Proceedings 13

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. THIS COURT HAS LONG RECOGNIZED THAT FACTORS EXTERNAL TO THE PETITIONER PROVIDE CAUSE TO EXCUSE A PROCEDURAL DEFAULT 18

II. THE STATE'S MISHANDLING OF ITS NOTICE OBLIGATIONS ESTABLISHES CAUSE FOR THE DEFAULT 22

A. The State's Notice Obligations 23

TABLE OF CONTENTS—Continued

Page

B. The State Mishandled Its Notice Obligations In The Circumstances Here 26

C. The State's Actions Establish Cause 34

III. THE CONDUCT OF MAPLES'S POST-CONVICTION COUNSEL ESTABLISHES CAUSE FOR THE DEFAULT 35

A. The Court of Appeals Erred Insofar As It Held That Attorney Misconduct Automatically Fails To Constitute Cause 35

B. Attorney Conduct Amounting To Abandonment Or Breach Of Loyalty Is Not Fairly Attributable To The Client 39

C. The Actions Of Maples's Post-Conviction Counsel Establish Cause 43

CONCLUSION 53

TABLE OF AUTHORITIES

Page(s)

CASES

Amadeo v. Zant,
486 U.S. 214 (1988) 21

American Dredging Co. v. Miller,
510 U.S. 443 (1994) 38

Babich v. Clower,
528 F.2d 293 (4th Cir. 1975) 32

Baldayaque v. United States,
338 F.3d 145 (2d Cir. 2003) 38

Bounds v. Smith,
430 U.S. 817 (1977) 31

Brown v. Allen,
344 U.S. 443 (1953) 21

Cameco, Inc. v. Gedicke,
690 A.3d 1051 (N.J. Super. Ct. App. Div.
1997) 44

Coleman v. Thompson,
501 U.S. 722 (1992) ..... *passim*

Dowd v. United States ex rel. Cook,
340 U.S. 206 (1951) 21

Esters v. State,
894 So. 2d 755 (Ala. Crim. App. 2003) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Frank v. Mangum,
237 U.S. 309 (1915) 31

Greene v. Lindsey,
456 U.S. 444 (1982) 24, 30

Harris v. Hutchinson,
209 F.3d 325 (4th Cir. 2000) 42

Hill v. Hawes,
320 U.S. 520 (1944) 23, 31

Holland v. Florida,
130 S. Ct. 2549 (2010) ..... *passim*

Ex parte Ingram,
675 So. 2d 863 (Ala. 1996) 9

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 37

Jamison v. Lockhart,
975 F.2d 1377 (8th Cir. 1992) 39

Ex parte Jenkins,
972 So. 2d 159 (Ala. 2005) 4

Jones v. Flowers,
547 U.S. 220 (2006) ..... *passim*

Link v. Wabash Railroad Co.,
370 U.S. 626 (1962) 37

TABLE OF AUTHORITIES—Continued

Page(s)

Malone v. Robinson,
614 A.2d 33 (D.C. 1992) 33

Manning v. Foster,
224 F.3d 1129 (9th Cir. 2000) 39

Marcangelo v. Boardwalk Regency,
47 F.3d 88 (3d Cir. 1995) 32

McCleskey v. Zant,
499 U.S. 467 (1991) 15, 18, 19

McLaughlin v. Lee,
No. 5:99-HC-436-BO, 2000 WL 34336152
(E.D.N.C. Oct. 19, 2000) 39

McWilliams v. State,
897 So. 2d 437 (Ala. Crim. App. 2004) 45

Mennen Co. v. Gillette Co.,
719 F.2d 568 (2d Cir. 1983) 32

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983) 24

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) ..... *passim*

Munaf v. Geren,
553 U.S. 674 (2008) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Murray v. Carrier,
477 U.S. 478 (1986) ..... *passim*

Murray v. Giarratano,
492 U.S. 1 (1989) 20, 31

Nara v. Frank,
264 F.3d 310 (3d Cir. 2001) 45

Porter v. State,
2 S.W.3d 73 (Ark. 1999) 45

Reed v. Ross,
468 U.S. 1 (1984) 19

In re Riggs,
240 F.3d 668 (7th Cir. 2001) 51

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 22

Rouse v. Lee,
339 F.3d 238 (4th Cir. 2003) 38

Schroeder v. City of New York,
371 U.S. 208 (1962) 25

Small v. United States,
136 F.3d 1334 (D.C. Cir. 1998) 28

Smith v. Ayer,
101 U.S. 320 (1880) 37, 38

TABLE OF AUTHORITIES—Continued

Page(s)

State v. DiGiulio,
835 P.2d 488 (Ariz. Ct. App. 1992) 40

Strickler v. Greene,
527 U.S. 263 (1999) 20

United States v. Galindo,
871 F.2d 99 (9th Cir. 1989) 40

Wainwright v. Sykes,
433 U.S. 72 (1977) 19

Ex parte Watkins,
28 U.S. (3 Pet. 193) 193 (1830) 18

Withrow v. Williams,
507 U.S. 680 (1993) 18, 19

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2243 18

Ala. Code. § 13A-3-2 cmt. (1975) 7

Ala. Code § 13A-5-46(f) (1975) 7

Ala. Code § 15-12-21(d) (1975) 5

Alabama Rule of Appellate Procedure 4(b)(1) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Alabama Rule of Criminal Procedure 6.2(b) 45, 51

Alabama Rule of Criminal Procedure 6.2 cmt. 45

Alabama Rule of Criminal Procedure 32.1 10

Alabama Rule of Criminal Procedure 34.4 .....11, 23, 31

Alabama Rule of Professional Conduct 4.2 46

Alabama Rule of Professional Conduct 1.7 51

OTHER AUTHORITIES

ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) 6

1 William Blackstone, *Commentaries on the Laws of England* (1765).....18

Code of Conduct for Judicial Employees, Canon 4(D).....44

Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 Tulsa L. Rev. 253 (2006).....6

TABLE OF AUTHORITIES—Continued

Page(s)

1 Floyd R. Mechem, *A Treatise on the Law of Agency* (2d ed. 1914) 41, 44, 49

Restatement (Second) of Agency (1958)

§ 111 ..... 42, 47

§ 112 40

§ 119 40

§ 137 50

§ 242 37

§ 394 ..... 41, 44

Restatement (Third) of Agency (2006)

§ 2.01 40

§ 3.08 45

§ 5.04 ..... 40, 49

Restatement (Third) of the Law Governing Lawyers § 58 (2000) 50

Robert L. Spangenberg, *Review of the Indigent Defense System in Alabama*, Executive Summary (June 1988) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Staff Regulations of Officials of the European Communities (2004), *available at* http://ec.europa.eu/civil_service/docs/toc100_en.pdf 44

Joseph Story, *Commentaries on the Law of Agency* (1839) 42, 45

Tr. of Oral Arg., *Jones v. Flowers*, No. 04-1477 (Jan. 17, 2006) 25

When Death is on the Line, Birmingham News, Nov. 8, 2005 5

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 586 F.3d 879. The opinion and orders of the district court denying habeas relief (Pet. App. 33a-218a) are not reported. The orders of the district court granting and expanding (*id.* at 219a-21a) the certificate of appealability are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2009. Pet. App. 1a. A timely petition for rehearing was denied on February 9, 2010. *Id.* at 238a-39a. Petitioner timely filed a petition for a writ of certiorari on July 9, 2010. This Court granted certiorari on March 21, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent constitutional and statutory provisions and rules are reprinted at Pet. App. 242a-52a.

INTRODUCTION

This case tests when events beyond an inmate's control may bar federal court review of the merits of serious constitutional claims on habeas. The petitioner, Cory Maples, is on death row in Alabama. The jury recommended death based on the slimmest margin allowed under Alabama law, following a trial and sentencing that were tainted by gross ineffectiveness on the part of Maples's court-appointed counsel, who themselves admitted that they were "stumbling around in the dark" given their inexperience in handling capital cases. *Infra* at 8-9. Maples seeks federal habeas review of the merits of his claim that he was convicted and sentenced to death in violation of the Sixth

Amendment. The courts below, however, held that Maples lost the opportunity even to raise that claim to a federal court due to a missed deadline for which all agree that Maples himself bears no blame.

The events giving rise to this case already have captured national attention. Maples's *pro bono* attorneys of record—who performed all the work on Maples's state post-conviction petition—left their law firm without notifying the state court or substituting counsel. When the state court clerk mailed notice of the denial of Maples's petition to those attorneys of record, the letters were returned to the clerk unopened and unclaimed, with "Return to Sender—Left Firm" written prominently on an envelope. Even though the attorneys of record had previously provided the court with their personal telephone numbers and home addresses, the clerk simply stuck the returned letters in a drawer—and did not attempt to follow up with anyone. The clerk had also mailed a copy of the order to local counsel but that attorney intentionally had assumed "no ... role" in the case other than to permit Maples's out-of-state *pro bono* attorneys to appear on behalf of Maples in Alabama. Pet. App. 257a. The deadline for appeal passed, and the courts below held that a state procedural default barred federal habeas review of Maples's constitutional claims.

For two overriding reasons, the courts below erred in concluding that Maples should be denied federal habeas review in such circumstances. First, the default is fairly attributable to the State's own actions because the state court clerk did nothing when both notices addressed to Maples's *pro bono* attorneys of record were returned unopened and unclaimed. This Court has held that a State's failure to do something more in

directly analogous circumstances violates due process when a *house* is at stake. *Jones v. Flowers*, 547 U.S. 220 (2006). The cause standard requires no less when a man's *life* is at stake. Second, the default is fairly attributable to the actions of Maples's attorneys because they abandoned him in his Alabama post-conviction proceeding and were "not operating as his agent in any meaningful sense of that word" when the events at issue unfolded. *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring in part and concurring in the judgment); *see id.* at 2564-65.

This Court has long recognized that cause exists to excuse a procedural default when "some objective factor *external* to the defense impeded" the petitioner's ability to comply with the default rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added). Ultimately this case turns on the application of that common-sense and settled rule. The judgment of the court of appeals below should be reversed.

STATEMENT OF THE CASE

A. Alabama's System For Representation Of Indigent Capital Defendants

In our federal system, States have undeniable leeway in fashioning and implementing their systems of criminal justice. The choices made by Alabama in fashioning its virtually unique system governing the representation of indigent defendants on death row have a direct bearing on the events giving rise both to the procedural default at issue and Maples's underlying ineffective assistance of counsel claims.

Practically alone among the 50 States, Alabama has chosen not to provide counsel for indigent capital defendants in state capital post-conviction proceedings.

While Alabama law permits courts to appoint post-conviction counsel, such appointments may be made "only after a petition has been filed." *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005). Thus, "inmates who are unable to find counsel to represent them before the limitations period for filing a [post-conviction] petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their [petition] and prepare and file a petition in the proper form with the proper claims in the proper court." *Id.*

Alabama has defended its decision not to afford post-conviction counsel in capital cases by encouraging this Court to "look[] closely at the sorts of lawyers who represent Alabama death-row inmates." Brief in Opposition 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) ("*Barbour* BIO"). In particular, Alabama has stated that, rather than providing for post-conviction counsel, it chooses "to rely on the efforts of typically well-funded *out-of-state* volunteers." *Id.* at 23 (emphasis added). In opposing certiorari in this case, the State argued that "no inmate currently on Alabama's death row" has proceeded through state post-conviction proceedings without an attorney, and represented that "86% of those attorneys either worked for the Equal Justice Initiative ..., out-of-state public interest groups ..., or an out-of-state mega-firm." Opp. 15 n.4; *see Barbour* BIO 5-22.

At the time Maples filed his post-conviction petition, Alabama law also provided that "[n]o foreign attorney may appear pro hac vice before any court ... of this state unless the attorney has associated in that cause an [Alabama] attorney ... called local counsel." Ala. R. for Admission to Ala. Bar VII(C) (1998) (JA

365). In 2006, however, Alabama changed that rule to provide that "[p]ro bono counsel need not associate local counsel." *Id.* (2008) (JA 375); *see* Order Amending Rule VII, App. C (2006) (JA 377). That change was made in recognition of the "considerable challenges" that Alabama has faced "in providing adequate legal representation to indigent persons, particularly criminal defendants in postconviction proceedings," and "to facilitate the provision of indigent defense services by foreign attorneys who volunteer to represent indigent defendants pro bono." JA 377.

Alabama claims to "focus[] its funding efforts on the crucial trial and direct-appeal phases of capital litigation." *Barbour* BIO 22. But at the time of Maples's trial, the State capped compensation for out-of-court work in capital cases (including a lawyer's preparation for trial and sentencing) at only $1,000 per attorney. Ala. Code § 15-12-21(d) (1975). As early as 1988—nine years before Maples's capital trial—an independent study commissioned by the Chief Justice of Alabama's Supreme Court concluded that "compensation rates for the private attorney are currently so low ... that competent attorneys have been steadily driven out of the system of representing indigent defendants." Robert L. Spangenberg, *Review of the Indigent Defense System in Alabama*, Executive Summary 4 (June 1988); *see also When Death is on the Line*, Birmingham News, Nov. 8, 2005 (Alabama's system has "discourage[d] highly qualified lawyers from taking cases," such that defendants facing the death penalty receive "court-appointed lawyers [who] often have little experience in capital cases").

Unlike most states, Alabama also disclaims any statewide oversight of indigent defense services. The

result is a "patchwork indigent defense system" that varies by circuit and that, "combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants[,] leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* at iii (June 2006); *see also* Alabama Appellate Court Justices Cert. Br. at 2 (discussing Alabama system); Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel,* 42 Tulsa L. Rev. 253, 257 (2006) ("The problems with Alabama's postconviction counsel system have very real, and very dramatic, consequences."). This case graphically illustrates the collateral consequences of Alabama's system for indigent death row defendants like Maples.

B. Maples's Trial Proceedings And Direct Appeal

1. After he was charged with the capital murder of two individuals, an Alabama court appointed Maples counsel to present his defense because of his indigent status. Maples's court-appointed attorneys had relatively scant experience in capital cases and, by law, were eligible to recover only $1,000 in fees each for their preparation of the case for trial and sentencing. In 1997, an Alabama jury found Maples guilty of two counts of capital murder: intentional murder during a robbery and intentional murder of two or more persons. The jury recommended death by a vote of 10-2—just one vote shy of the number that would have barred the jury from issuing such a recommendation

under state law. Ala. Code § 13A-5-46(f). The trial court then sentenced Maples to death. Pet. App. 1a.

a. Because of trial counsel's gross ineffectiveness, key facts as to both the offenses and appropriateness of a death sentence were never explored. At trial the State introduced evidence that Maples—who had a history of serious drug and alcohol dependence, but no prior record of violent crime—drank heavily and used drugs on the night of the offense. One of the State's witnesses testified that she saw Maples with drugs shortly after the shootings and that Maples told her he had been "doing crystal meth and crack" that evening. R. 1894.[1] Numerous other witnesses testified that Maples's behavior before the shootings was abnormal, R. 1848, R. 1858-59, and that he was "hyper," acting "drunk," or not making sense. R. 1848, 1858, 1803.

Under Alabama law, the jury would have been entitled to conclude that Maples lacked the mental state necessary for capital murder because of voluntary intoxication. *See* Ala. Code § 13A-3-2 cmt. ("[D]runkenness due to liquor or drugs may render defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime."). But Maples's attorneys failed even to investigate evidence that Maples had been drinking and using drugs, presented no evidence at trial that Maples was intoxicated at the time of the shootings, and did not even request an instruction on voluntary intoxication or manslaughter. Pet. App. 20a-21a. Instead, Maples's attorneys told the jury that

---

[1] "R." refers to the record for this case in the Circuit Court of Morgan County, Alabama, Case No. CC95-842, as submitted to the Court of Criminal Appeals of Alabama, Case No. CR-03-0021.

Maples was *not* intoxicated—even though they also later told the jury during the penalty phase that "but for the alcohol and drug usage on this occasion, [the shooting] would probably not have happened." R. 3086.

Maples's state-appointed counsel scarcely mounted a defense at trial, presenting roughly one hour's worth of testimony *total*—comprising less than forty pages of the trial transcript including the state's cross-examinations. *See* R. 2732-66; 2848-51. And the defense that Maples's attorneys did put forth was incoherent and inconsistent. In their opening statements, the attorneys suggested that there were serious doubts concerning "who did this crime, who committed it," and implied that Maples had confessed "to protect someone." R. 1471-73. In their closing arguments, however, Maples's attorneys inexplicably shifted course and told the jury that "[w]hat we have here is ... [Maples] walking out to the car and in an instantaneous rush killing two people," R. 2918, and "conceded ... there was a loss of life caused intentionally at the hand of Corey [sic] Maples," R. 2914. In other words, in their own closing, Maples's state-provided attorneys all but professed Maples's guilt to capital murder under Alabama law.

b. If anything, Maples's court-appointed attorneys only compounded their errors at the penalty stage. The penalty phase began following a lunch break on the same day that the jury handed down its verdict in the guilt phase and lasted all of an afternoon, with closing arguments the following morning. During the hearing, Maples's attorneys—who had never previously tried the penalty phase of a capital case—admitted to the jury that, owing to their inexperience, they "may appear to be stumbling around in the dark." R. 3081-

82. And the manner in which they prepared for and handled the proceeding underscored that admission. Their affirmative case at the penalty phase amounted to unprepared testimony from three family members and the testimony of a psychologist who had met with Maples months earlier for four hours and made no "formal diagnosis." R. 3100, 3105, 3165.

Maples's trial counsel failed to investigate numerous matters highly relevant to sentencing, including Maples's abusive childhood and abandonment by his mother, Maples's mental health and history of depression and suicide attempts as well as the history of mental illness in Maples's family, and his extensive history of alcohol and substance abuse including abuse of crack cocaine, crystal methamphetamine, and LSD. Nor did Maples's attorneys investigate Maples's character, cooperation with the police, and voluntary admission to a drug treatment program.

2. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and sentence. Pet. App. 2a. Consistent with settled Alabama law, Maples was not permitted on appeal to challenge the effectiveness of the assistance that he received from counsel at trial. *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

C. Maples's State Post-Conviction Proceedings

1. As noted above, Alabama does not provide post-conviction counsel to indigent defendants, even in capital cases. At first, it nevertheless seemed as though Maples had won the lottery when two attorneys working at an elite New York law firm (Sullivan & Cromwell)—Clara Ingen-Housz and Jaasi Munanka—agreed to represent Maples *pro bono* "on an individual

basis." Pet. App. 257a. But as it turned out, the representation ended tragically for Maples.

a. On August 1, 2001, Maples—with Ingen-Housz and Munanka serving as his *pro bono* attorneys of record—filed a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32.1, raising ineffective assistance of counsel and other claims. Because Ingen-Housz and Munanka were out-of-state attorneys, Alabama law required them to "associate" a local counsel before they could appear in the Alabama courts on behalf of Maples. Ala. R. for Admission to Ala. Bar VII (1998) (JA 365-66). Maples's out-of-state *pro bono* attorneys associated John Butler, a Huntsville, Alabama attorney. Butler appeared as local counsel for the sole purpose of allowing Ingen-Housz and Munanka to proceed *pro hac vice* as *pro bono* counsel (and for that reason lent his name to the briefs, as required by the Alabama rule, JA 365-66), but "had no other role in the case" during the period at issue. Pet. App. 257a; *see id.* at 3a, 255a-56a.

b. The State moved to dismiss Maples's Rule 32 petition. The state trial court initially denied the State's motion to dismiss in December 2001, and Maples's requests for discovery remained pending before the court. In the 18 months that followed, nothing happened in the case. But on May 22, 2003, the Alabama trial court issued an order denying the petition outright. *Id.* at 3a. The order explicitly "CC"'d Maples' *pro bono* attorneys of record (Ingen-Housz and Munanka) as well as Butler. JA 225. Through no fault of his own, Maples did not receive notice of the trial court's order before the general 42-day deadline for appealing the order lapsed.

c. Consistent with the Alabama rule requiring service on "the attorney of record" (Ala. R. Crim P. 34.4) and the terms of the order itself (JA 225), the trial court clerk mailed copies of the order individually addressed to Maples's *pro bono* attorneys of record (Ingen-Housz and Munanka) and to Butler at their work addresses. Pet. App. 222a-23a. Several months earlier, however, both Ingen-Housz and Munanka had left Sullivan & Cromwell—without notice to the Alabama court or substitution of counsel. *Id.* at 223a. Ingen-Housz left the firm on July 2, 2002, to work for the European Commission in Belgium, and Munanka left the firm in the summer of 2002 to serve as a law clerk for a federal judge in New York. *Id.* at 258a. No one else at the law firm contacted the court or sought admission *pro hac vice* to represent Maples. *Id.* at 223a.

The copies of the Alabama court's Rule 32 order mailed to Ingen-Housz and Munanka were returned to the trial court clerk unopened with "Returned to Sender—Attempted Unknown" stamped on the envelope addressed to Munanka, and "Returned to Sender—Attempted Not Known" stamped on the envelope addressed to Ingen-Housz and "Return to Sender—Left Firm" written on the front. Pet. App. 223a; *see* Pet. Reply Br. Add. 7a-8a (reproducing copies of returned envelopes). Butler received the order in the mail, but did nothing. Pet. App. at 256a.

After receiving the unopened and unclaimed envelopes containing the order addressed to Maples' *pro bono* attorneys of record, the court clerk did nothing. The *pro hac vice* applications Ingen-Housz and Munanka filed with the court listed their personal telephone numbers and home addresses, *see* Ingen-Housz Verified Application for Admission to Practice

Under Rule VII at 1, *Maples v. Alabama*, No. CC-95-842.60 (Ala. Cir. July 17, 2001); Munanka Verified Application for Admission to Practice Under Rule VII at 1, *Maples v. Alabama*, No. CC-95-842.60 (Ala. Cir. July 24, 2001), and the clerk obviously had access to Maples's prison address. But the clerk made no further effort to contact *pro bono* counsel (or anyone else at their former law firm), local counsel, or Maples himself. There matters stood and the 42-day period for appeal under Alabama Rule of Appellate Procedure 4(b)(1) passed. Although Maples had earlier instructed his attorneys to appeal any adverse decision, JA 253, no action was taken and Maples remained unaware that his opportunity to appeal had come and gone.

d. On August 13, 2003, about a month after the appeal deadline had passed, the State's attorney sent a letter to Maples himself—not his attorneys—to "inform [him] of recent events" concerning the dismissal of his Rule 32 petition and to advise him that the time for filing a federal habeas corpus petition would soon expire. Pet. App. 253a. When Maples learned of the missed deadline, he immediately informed his step-mother, who then contacted the law firm where Ingen-Housz and Munanka had worked. Other attorneys at that firm—"not yet ... admitted to practice in Alabama," *id.* at 223a—sought leave to appeal notwithstanding the missed deadline, but that request was denied. *Id.* at 5a. As the Alabama court explained, Ingen-Housz and Munanka were "still attorneys of record" for Maples in his Rule 32 case, even though they had long since left the case. *Id.* at 223a.

2. The Alabama trial court rejected the argument that the clerk "committed error or neglect in handling th[e] matter," observing: "How can a Circuit Clerk in

Decatur, Alabama know what is going on in a law firm in New York, New York?" *Id.* at 223a-24a. Instead, the court concluded that the clerk had satisfied his obligations by mailing the order to Maples's attorneys of record "at their listed addresses." *Id.* at 224a. Although the Alabama Court of Criminal Appeals recognized that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," it also concluded that the State "was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition" and that Maples had failed to show a violation of due process. *Id.* at 234a, 236a. The Alabama Supreme Court summarily affirmed, and this Court denied certiorari.

D. Maples's Federal Habeas Proceedings

1. On August 29, 2003, Maples filed a federal habeas petition raising, *inter alia*, ineffective assistance of counsel claims. That petition was stayed pending the state court proceedings, and amended in May 2005. Notwithstanding the State's representation to the Alabama Supreme Court that Maples "'may still present his postconviction claims'" on federal habeas, *id.* at 18a (citation omitted), the State responded to Maples's federal habeas petition by arguing that Maples procedurally defaulted on his ineffective assistance of counsel claims due to the missed deadline, and that federal review of those claims was barred.

The district court found that Maples had defaulted his ineffective assistance of counsel claims by missing the deadline under Alabama law for appealing the denial of his Rule 32 petition and failed to establish cause to overcome the default on the ground that "ineffectiveness of postconviction counsel cannot establish ... cause." *Id.* at 55a (citing *Coleman v.*

Thompson, 501 U.S. 722, 752 (1991)). The court nevertheless authorized an appeal, recognizing that "[j]urists of reason" could "debat[e]" whether the alleged default rule was "firmly established and regularly followed" and whether Maples had established cause given the extraordinary circumstances underlying the default. Pet. App. 221a.

2. A divided panel of the Eleventh Circuit affirmed. The panel majority held that the Alabama procedural rule underlying Maples's default was adequate and that Maples had failed to show cause to excuse that default on the ground that attorney performance can never constitute cause to excuse a default "because there is no right to post-conviction counsel." *Id.* at 17a-18a (citing *Coleman,* 501 U.S. at 752). Judge Barkett dissented. *Id.* at 27a-32a. She concluded that the State's default rule was not adequate, and that, in any event, equity, if not the Constitution, required that Maples be afforded federal review of his claims given that he had raised a serious ineffective assistance of counsel claim that would go unreviewed for reasons involving no fault of his own. *Id.* at 30a-31a & n.3.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that Maples failed to establish cause to excuse the procedural default based on the external factors that impeded his ability to meet the appeal deadline.

I. Consistent with the equitable nature of the writ, this Court has held that the federal courts have the power to excuse a state procedural default when a petitioner can establish cause for and prejudice from the default. In determining whether cause exists—the question in this case—this Court looks to whether the

default may "fairly be attributed" to the petitioner, or instead, is fairly attributable to an "external" factor. *Coleman v. Thompson*, 501 U.S. 722, 753 (1992). Cause exists when "some objective factor external to the defense impeded [the petitioner's] efforts" to comply with the default rule. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (citation omitted). The State's own interference with a petitioner's ability to meet a filing deadline is a classic example of cause because a default attributable to the State's own conduct is imputed to the State, not the petitioner. And cause likewise also exists when a petitioner can show that other external factors impeded his ability to comply with the default rule. In either case, it would be grossly inequitable to cut off federal habeas review on the basis of a default that is not fairly attributable to the petitioner himself.

II. The State's failure to follow up on the returned notices impeded Maples's ability to comply with the default rule and thus establishes cause. Indeed, that failure violated due process. In *Jones v. Flowers*, 547 U.S. 220, 229 (2006), this Court held that a State may not simply "shrug [its] shoulders and say 'I tried'" when it learns that its attempt to provide notice of the deprivation of an important *property* interest has failed because the letters it has mailed have been returned unclaimed. Instead, due process requires the State to do something more to notify the property owner in such circumstances. Due process requires no less when a *life* is at stake. Yet here, the court clerk did nothing when the notices to both Maples's out-of-state *pro bono* attorneys of record were returned unopened and unclaimed, except to stick the notices in a file drawer. The State's failure to do anything more deprived

Maples of constitutionally adequate notice and directly impeded his ability to meet the deadline for appeal.

The fact that the notice mailed to local counsel was received, rather than returned, does not alter that result. It is well-known that volunteer out-of-state counsel play a critical and primary role under Alabama's unique post-conviction representation scheme for indigent capital inmates. That alone makes it unreasonable for the State to rely solely on the fact the notice was sent to local counsel—and do nothing further—when the notice to an inmate's out-of-state *pro bono* counsel is returned unclaimed. Further, because both Alabama law and the order in this case required *all* attorneys of record to be served, the clerk's failure to do anything when notice to the out-of-state lead counsel was returned impeded the provision of notice to the client by creating an undue risk of confusion among counsel—who are entitled to presume in such circumstances that reasonable efforts to provide notice will in fact be made to the attorneys required by statute or court order. It also defies common-sense to say that someone who really wanted to provide notice of a life-or-death matter would sit on his hands when two out of the three notices that were mailed come back unopened and unclaimed.

III. The extraordinary conduct of Maples's attorneys independently establishes cause to excuse the procedural default. The court of appeals cut off any inquiry into whether the actions of Maples's attorneys established cause because it believed that *Coleman* compels the conclusion that attorney conduct can never constitute cause. That was error. *Coleman* establishes that attorney conduct in post-conviction proceedings cannot be *imputed to the State* on the ground that

inmates are constitutionally entitled to effective assistance of counsel at that stage. But *Coleman* does not prevent a petitioner from showing that attorney error is nevertheless still external to the defense—and therefore may constitute cause—because it cannot fairly be attributed to the petitioner under general agency principles or the law governing the attorney-client relationship. And this Court recently recognized that a petitioner cannot be held constructively responsible for the extraordinary misconduct of an attorney who has effectively abandoned his client. *Holland v. Florida*, 130 S. Ct. 2549 (2010).

The misconduct of Maples's attorneys cannot fairly be attributed to Maples. Maples's *pro bono* attorneys of record—Ingen-Housz and Munanka—left the law firm where they had worked without notifying the court or substituting counsel, and then assumed new employment that precluded them from continuing to work on Maples's case. That abandonment terminated the agency relationship and constituted a breach of the duty of loyalty. And as the Alabama court found, once Ingen-Housz and Munanka had left the case, there was no one at Sullivan & Cromwell authorized to represent Maples in his Rule 32 proceeding, Pet. App. 223a—leaving him without *pro bono* counsel in that proceeding. Butler likewise was not operating as an agent in any meaningful sense at the time of the default and abandoned Maples as well. By his own admission, the *only* role that Butler assumed before the default was to facilitate the representation by Maples's out-of-state *pro bono* attorneys. He was never Maples's agent in any genuine sense. Moreover, the highly circumscribed role that he did assume represented a gross breach of his duty of loyalty to Maples.

Because these external events—both collectively and independently—impeded Maples's ability to meet the deadline for appealing the denial of his Rule 32 petition, cause exists to excuse the default. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THIS COURT HAS LONG RECOGNIZED THAT FACTORS EXTERNAL TO THE PETITIONER PROVIDE CAUSE TO EXCUSE A PROCEDURAL DEFAULT

"The writ of habeas corpus is one of the centerpieces of our liberties." *McCleskey v. Zant*, 499 U.S. 467, 496 (1991). From Chief Justice Marshall to Chief Justice Roberts, this Court has recognized that the availability of the writ ultimately is governed by equitable principles. *See Ex parte Watkins*, 28 U.S. (3 Pet. 193) 193, 201 (1830) (Marshall, C.J.) ("No doubt exists respecting the power [of the Court to issue the writ]; the question is, whether this be a case in which it ought to be exercised."); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (Habeas is "'governed by equitable principles.'") (Roberts, C.J.) (citation omitted). The focus on equity not only reflects "a long historic tradition," but also Congress's express statutory command. *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see id.* (noting that "the text of the federal habeas statute ... enjoins the court to 'dispose of the matter as law *and justice* require.'") (quoting 28 U.S.C. § 2243) (emphasis in original); 1 William Blackstone, *Commentaries on the Laws of England* 131 (1765) (explaining that in exercising the writ, courts were directed to do "as to justice shall pertain").

This Court has limited adjudication in federal habeas corpus of claims defaulted in state court because of concerns surrounding the "costs of federal habeas review" in such circumstances. *McCleskey*, 499 U.S. at 490-91. At the same time, however, this Court has stressed that the federal courts have the "power to *excuse* ... defaulted claims" in exercising their "equitable discretion" in administering the writ. *Id.* at 490 (emphasis added); *see Reed v. Ross*, 468 U.S. 1, 9 (1984) (This Court's decisions "have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."); *Withrow*, 507 U.S. at 717-18 ("equitable principles" govern whether a state procedural default should be excused so that a petitioner may obtain review of his habeas claims in federal court) (Scalia, J., concurring in part and dissenting in part).

When a habeas petitioner's claims are procedurally defaulted pursuant to an adequate state rule, federal habeas review is available to petitioners who can demonstrate "cause" for and "prejudice" from the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). Consistent with equitable principles, this Court's inquiry into cause has focused on whether the cause of the procedural default may "fairly be attributed" to the petitioner or to some "external" factor. *Coleman*, 501 U.S. at 753; *see McCleskey*, 499 U.S. at 493 ("In procedural default cases, the cause standard requires the petitioner to show that 'some objective factor external to the defense impeded

counsel's efforts' to raise the claim in state court.") (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

When a state procedural default is fairly attributable to *the petitioner*, there is "no inequity in requiring him to bear" the consequences of the procedural default, particularly given the costs that this Court has identified of allowing federal habeas review of defaulted claims when it comes to comity and finality. *Carrier*, 477 U.S. at 488. But equity tips decisively in the opposite direction when the petitioner can "show that some objective factor *external* to the defense" impeded compliance with the State's procedural rule. *Id.* (emphasis added); *see Coleman*, 501 U.S. at 753; *Holland v. Florida*, 130 S. Ct. 2549, 2566 (2010) (Alito, J., concurring in part and concurring in the judgment). The obvious inequities of barring federal habeas review of potentially meritorious constitutional claims when a procedural default is not attributable to the petitioner himself are exponentially magnified in capital cases. *Cf. Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (noting that a "substantial proportion of [capital] prisoners succeed in having their death sentences vacated in habeas corpus proceedings").

While this Court has never "attempt[ed] an exhaustive catalog of such objective impediments to compliance with a [state] procedural rule," it has repeatedly made clear that conduct *by the State* that impedes a petitioner's ability to comply with a state procedural rule provides cause to excuse a default. *Carrier*, 477 U.S. at 488; *see, e.g., Strickler v. Greene*, 527 U.S. 263, 283-84 & n.22 (1999) (unanimously finding cause when defense's reasonable reliance on a State's actions, assertions, and policy precipitated state

procedural default); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (finding cause where factual basis for claim had been "concealed by ... County officials"); *Brown v. Allen*, 344 U.S. 443, 485-86 (1953) (noting that "interference by officials" may provide cause); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 207-08 (1951) (finding that default could not bar federal review where state prison rules prevented petitioner from mailing appeal papers on time).

It likewise follows that when a state procedural default cannot otherwise fairly be imputed to the petitioner, equitable considerations counsel against depriving the petitioner of his right to assert the writ. When a default is caused by "something *external* to the petitioner, something that cannot be fairly attributed to him," *Coleman*, 501 U.S. at 753, it would be grossly inequitable to force the blameless petitioner to bear the consequences of that default. *See Carrier*, 477 U.S. at 488 (asking whether there would be "inequity in requiring [a petitioner] to bear" the consequences of the default). For example, no one could reasonably argue that a petitioner should bear the consequences of a procedural default where a natural disaster, like an hurricane, flood, or tornado, prevented the petitioner from meeting a deadline. So too for a man-made event, like an anthrax attack, that shuts down the mail system or courts. The result is no different when some other *external* factor—which cannot fairly be attributed to the petitioner—causes the missed deadline.

The courts below concluded that there was no cause to excuse the procedural default at issue. But that was error. Two external factors impeded Maples's ability to comply with the asserted default rule and unquestionably led to the default. First, the court clerk

inexplicably failed to do anything when it learned that the State's effort to notify Maples's *pro bono* attorneys of record had failed—even though those attorneys had submitted their home addresses and telephone numbers, and Maples himself was in state custody. That failure makes *the State itself* fairly responsible for what happened, and indeed violated Maples's due process rights. Second, Maples's attorneys had abandoned him and were no longer functioning as his agents in any meaningful sense during the critical juncture. The conduct of Maples's attorneys therefore is not fairly attributable to Maples either. Any of those external factors is sufficient to excuse the default.[2]

II. THE STATE'S MISHANDLING OF ITS NOTICE OBLIGATIONS ESTABLISHES CAUSE FOR THE DEFAULT

The State's attempt to provide notice to Maples's attorneys of record of the denial of his Rule 32 petition was so deficient that the procedural default is fairly attributable to the State itself. The court clerk's failure to do something more when the notices to Maples's *pro bono* attorneys of record were returned

---

[2] Because it held that cause did not exist, the court of appeals did not reach the question of prejudice. It is clear, however, that Maples's lost opportunity to pursue his constitutional claims on appeal and federal habeas amounts to prejudice. *See Holland*, 130 S. Ct. at 2565 (noting that such "failures *seriously prejudiced* a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence") (emphasis added); *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (holding that attorney's deficient conduct resulting in missed appeal "mandates a presumption of prejudice"). Accordingly, if this Court concludes that there is cause, it should hold that the prejudice element is met as well.

unopened violated Maples's due process rights under the rule of *Jones v. Flowers*, 547 U.S. 220, 230 (2006)—a case that the State simply ignored in opposing certiorari. Although a constitutional violation is not required to establish cause for a procedural default, it is always sufficient—because when such a violation exists the Constitution "itself requires that responsibility for the default be imputed to the State," rather than the petitioner. *Carrier*, 477 U.S. at 488.

A. The State's Notice Obligations

1. Alabama law provides that notices of rulings "shall be made upon the attorney of record" in a case. Ala. R. Crim. P. 34.4. It is undisputed that, as the Alabama courts below found, this rule required that the clerk provide notice to Maples's *pro bono* attorneys of record as well as local counsel. Pet. App. 234a ("Here, Maples was represented by three attorneys. Because Maples was represented by attorneys, all correspondence from the circuit clerk was directed to the attorneys. See Rule 34.4, Ala.R.Crim.P."). The Alabama rules do not attach any consequence to the failure to provide such notice. But as this Court long ago observed in interpreting an analogous provision of a federal court's rules requiring a court clerk to provide notice of the entry of judgment, "we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given." *Hill v. Hawes*, 320 U.S. 520, 523 (1944).

2. The State's own, self-imposed notice obligations must also be informed by the minimum requirements of due process. This Court has long recognized that a State's duty to provide notice is an "elementary and fundamental requirement of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314

(1950). And it is established that a State must provide notice "prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

The minimum due process requirements for notice are well-settled. As Justice Jackson wrote for the Court in the seminal *Mullane* case, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. In assessing "all the circumstances," the State must give due regard to the "practicalities and peculiarities of the case," *id.* at 314-15, including any "unique information about an intended recipient," *Jones*, 547 U.S. at 230. Likewise, if circumstances generally exist that, as a practical matter, would "not infrequently" prevent interested parties from receiving notice, then such circumstances must be factored into the equation of what notice is reasonable. *Greene v. Lindsey*, 456 U.S. 444, 453 (1982) (taking into account in *Mullane* analysis that notices posted on apartment doors in pertinent area "were 'not infrequently' removed by children or other tenants before they could have their intended effect").

This Court has made clear that the notice required by due process is not a "mere gesture," but "must be such as one *desirous of actually informing* the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315 (emphasis added); *see Jones*, 547 U.S. at 238. Thus, for example, notice published in the "back pages of a newspaper," *id.* at 315, or in the "general vicinity" of a property owner's premises is inconsistent with a true desire to provide notice,

Schroeder v. City of New York, 371 U.S. 208, 210 (1962). Instead, "*Mullane* said that we look to what a person who *really wanted* to find the [intended recipient of notice] would do." Tr. of Oral Arg. 54, *Jones v. Flowers*, No. 04-1477 (Jan. 17, 2006) (Question by Roberts, C.J.) (emphasis added).

In "assessing the adequacy of a particular form of notice," this Court has also held that due process "requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314). Thus, in calibrating what notice was reasonable in *Mullane*, this Court balanced the State's "vital interest ... in bringing any issues as to its fiduciaries to final settlement," 339 U.S. at 313, with the importance of the property rights at issue and practical ease of notifying beneficiaries by mail, *id.* at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").

3. The Court recently applied these settled principles in *Jones v. Flowers*, a case that bears remarkable similarities to the one at hand. *Jones* concerned a State's efforts to take a house based on the homeowner's unpaid taxes. The State attempted to notify the owner through certified mail, but the notices were returned "unclaimed." 547 U.S. at 223-24. Although the returned letters informed the State that its "attempt at notice had failed," the State did nothing. *Id.* at 238. The Court rejected the argument that the notice was sufficient because it was reasonably calculated to reach its intended recipient *when it was mailed*. Instead, the determination whether notice was

adequate had to take into account "'practicalities and peculiarities of the case,'" which included the State's knowledge that the letters in fact were *returned* "unclaimed." *Id.* at 229-31 (citation omitted).

The Court's decision took a common sense, real world approach to the situation—and what was at stake. The Court explained that, "when a letter is returned by the post man, the sender will ordinarily attempt to resend it, if it is practicable to do so." *Id.* at 230. The Court emphasized that the "subject matter of the letter" at issue concerned the "important and irretrievable prospect [of] the loss of a house." *Id.* And the Court flatly rejected the notion that "a person who *actually desired* to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 229 (emphasis added). It is not enough, in other words, for the State, when it learns that the letters were not received, simply to "shrug [its] shoulders ... and say 'I tried.'" *Id.* Rather, the Court held, due process obligates the State to do *something* more, particularly given that "additional reasonable steps were available for [the State] to employ before taking Jones' property." *Id.* at 238-39.

B. The State Mishandled Its Notice Obligations In The Circumstances Here

The State seriously mishandled its notice obligations in attempting to provide notice to Maples of the order denying his Rule 32 petition. And as a result of its missteps, Maples's failure to file a timely appeal of that order is fairly attributable to the State itself.

1. *Jones* alone establishes that notice was inadequate in this case. Here, as in *Jones*, the State learned that its attempt to provide notice by mail had

failed—and yet the State failed to follow up in any way. The clerk received copies of the unopened orders sent to both *pro bono* attorneys of record in the return mail, and the envelopes plainly indicated that they were not delivered and even explicitly said that an attorney had "Left Firm." *See* Pet. Reply Br. Add. 7a-8a. Yet, just as in *Jones*, upon receiving the unopened and unclaimed envelopes, the state court clerk did "nothing." *Jones*, 547 U.S. at 234. And just as in *Jones*, the state clerk's "[f]ailure to follow up [was] unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229.

For at least three reasons, the State's failure to do *something* more when the letters were returned to the court clerk unclaimed is even more unreasonable here than it was in *Jones*. First, the individual interest in obtaining notice is even greater here. Both *Mullane* and *Jones* hold that "the adequacy of notice" in a particular case depends on "balancing 'the interest of the State' against "the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314). Whereas the notice in *Jones* "concern[ed] such an important and irreversible prospect as the loss of a house," *id.* at 230, the notice in this case ultimately concerned the "important and irreversible prospect" of extinguishing a *life*. The fact that a man's life is at stake makes it all the more unreasonable for the State to sit on its hands and do nothing when it learned that notice to both *pro bono* attorneys of record had failed.

Second, the corresponding "interest of the State" in not doing something more is vanishingly small if not non-existent in this case. *Id.* at 229. In *Jones*, although

this Court identified several "reasonable steps" the State could have taken to notify Jones, the State did not have any address on file other than the one it had already (unsuccessfully) used. *Id.* at 234-36. Here, Ingen-Housz and Munanka's motions for admission to practice *pro hac vice* in the Alabama courts—which presumably were sitting in the clerk's case file—listed their personal phone numbers and addresses (in addition to their work information). *See supra* at 11-12. So the clerk could have simply picked up the phone and dialed their personal numbers or put the orders in the mail to their home addresses. Following up in that fashion would have made perfect sense since one of the envelopes had "Left Firm" written on it. Pet. Reply Br. Add. 7a.[3] And the State knew exactly where to find Maples himself—he is confined to a cell on death row in Alabama. Pet. App. 5a; *see Small v. United States*, 136 F.3d 1334, 1338 (D.C. Cir. 1998) ("Certainly, if, as is true here, the government knows that a claimant is in prison, it cannot, with a straight face, claim it does not know where he is.").

Third, the State took fewer initial steps to provide notice to Maples than did the State in *Jones*. Here, the State mailed the orders to the attorneys of record by regular mail, then did nothing. By contrast, in *Jones*, the State mailed a certified letter that obligated the post office to make three separate attempts to deliver it. *See Jones*, 547 U.S. at 241 (Thomas, Scalia, and Kennedy, JJ., dissenting). Two years later, the State in

---

[3] Ingen-Housz had left the country by that time, but Munanka remained in New York. *Supra* at 11. And even as to Ingen-Housz, attempting to contact her through her personal telephone number or home address could have led to successful notice.

Jones published a notice of sale in a local paper and sent "yet another certified letter to petitioner," which was also returned unclaimed after three delivery attempts. *Id.* Despite these far greater efforts, this Court held that the notice in *Jones* violated due process. *A fortiori* the same result follows here.

2. In its brief in opposition, the State—tellingly—did not even acknowledge *Jones*, much less attempt to distinguish it. Instead, the State focused its efforts on arguing (incorrectly) that this issue had been waived. To the extent the State addressed the notice deficiency at all, its only response was to rely on the fact that local counsel received a copy of the order. Opp. 31-32. Of course, at the critical time—when the clock was ticking on the deadline for an appeal—the State did not *know* that local counsel had received the order because the order was sent by regular mail rather than certified mail. But in any event, ultimately the question is whether notice was reasonably calculated, under *all the circumstances*, to apprise Maples of the denial of his Rule 32 petition. *Mullane*, 339 U.S. at 314. Here, there were several circumstances that made it unreasonable for the clerk to do nothing when notice to Maples's *pro bono* attorneys of record was returned.

First, as discussed above, Alabama has made a conscious and well-known choice to rely primarily on "out-of-state volunteers" to serve as the principal—if not, as a practical matter, sole—counsel to Alabama's substantial death row population. *Barbour* BIO 23; *see also* JA 339 (explaining "typical[]" role of "out of state counsel" in capital cases) (Counsel for State); Alabama Appellate Court Justices Cert. Br. 6-7, 17-18 (discussing the State's reliance on out-of-state *pro bono* counsel in post-conviction proceedings and fact that

"local counsel for out-of-state attorneys in postconviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted"); ACDLA Cert. Br. 17-18 (noting reliance on volunteer counsel). Indeed, the State recently told this Court that 75% of Alabama's death row inmates are represented in post-conviction proceedings by "'out-of-state law firms and/or public interest groups.'" *Barbour* BIO 11 (citation omitted); *see* Opp. 16 n.4.

The State's *ex ante* awareness of this scheme is one of the "practicalities and peculiarities of the case" that defines what notice was reasonably calculated. *Mullane*, 339 U.S. at 314-15; *see also Jones*, 547 U.S. at 230 ("[W]e have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."). Given the well-known "realities" of the situation on the ground in Alabama, *Greene*, 456 U.S. at 451, it was unreasonable for the clerk to do nothing when it learned that the notices to both of Maples's out-of-state *pro bono* attorneys had failed, even if the clerk assumed *ex ante* that local counsel had in fact received the letter. *Cf. id.* at 453 (more was required where notices were "not infrequently" removed from apartment doors). The role of out-of-state *pro bono* counsel under Alabama's unique representation scheme for post-conviction proceedings is simply too important for a clerk to do nothing in these circumstances.[4]

---

[4] The combination of the State's conscious decision to rely on out-of-state volunteers to handle the representation of indigent capital defendants in post-conviction proceedings—and the failure of court clerks to do anything when notice to such counsel is returned unclaimed—raises an additional constitutional defect: it

Second, even apart from the weight placed on out-of-state counsel under Alabama's representation scheme, the State sent notice to Maples's *pro bono* attorneys of record for a reason—it was required to do so by its own rules. As noted, Alabama law provides that "service *shall be made* upon the attorney of record," Ala. R. Crim. P. 34.4 (emphasis added), and it is undisputed that Rule 34.4 required service on Maples's *pro bono* attorneys of record. *See supra* at 23. Having undertaken to serve all attorneys of record, Alabama may not reasonably defend its actions on the ground that one out of three attorneys actually received notice. *Cf. Frank v. Mangum*, 237 U.S. 309, 327 (1915) (even though a State is not compelled to provide a particular procedure, when it chooses to do so such procedure must be factored into the equation in determining whether there has been a deprivation of due process). When a State's rules *require* that all attorneys of record be served in a matter, counsel may reasonably rely on fact that such notice will be reasonably calculated actually to work. *Cf. Hill*, 320 U.S. at 523 ("[W]e can think of no reason for requiring

---

deprives capital inmates like Maples of "meaningful access" to the judicial process. *Giarratano*, 492 U.S. at 14 (Kennedy, J., joined by O'Connor, J., concurring in the judgment) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). Indeed, "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Id.* Ultimately, Maples's access to the courts has been severed largely as a result of the one-of-a-kind representation scheme created by Alabama. In 2006, Alabama attempted to address the problem in part by eliminating the requirement that out-of-state volunteers associate with local counsel in capital cases. *See supra* at 5. But that change occurred long after the events at issue here.

the notice if counsel in the cause are not entitled to rely upon the requirement that it be given.").[5]

Moreover, the Alabama court's own actions reinforced the expectation that all attorneys of record *would* receive notice, heightening the likelihood of confusion among counsel if notice was not received by one set of counsel. At the end of the order denying Maples's petition for relief, the court specified—by way of a "CC" listing counsel—that Maples's *pro bono* attorneys of record would receive notice of the order in addition to local counsel. JA 225. In directly analogous circumstances, courts have recognized that a court order stating that "*all* counsel of record" will be served can create "confusion" among local counsel and out-of-state lead counsel when (as it turns out) the former receives the order and the latter does not. *Babich v. Clower*, 528 F.2d 293, 295 & n.2 (4th Cir. 1975); *see also Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983) (citing *Babich* as a "particularly apposite" example of a situation where counsel's failure to meet a filing deadline "occurs because the party has been misled by action of the court or its officers"). The likelihood of confusion—which, in such circumstances, is fairly attributable to the State itself—makes it all

---

[5] Other jurisdictions have adopted rules providing that the clerk is required to send copies of court orders only to local counsel, even when the "principal counsel" is out-of-state. *See, e.g., Marcangelo v. Boardwalk Regency*, 47 F.3d 88, 89 (3d Cir. 1995). Such a rule at least has the benefit of informing counsel upfront that *only* local counsel will be served. Because the Alabama rules—not to mention the Rule 32 order itself—required service on *all* attorneys of record, the validity of such a local-counsel-only notice rule in a capital post-conviction proceeding handled by *pro bono* out-of-state counsel is not presented here.

the more unreasonable for the clerk to do nothing when notice to out-of-state counsel is returned unopened.[6]

Third, regardless of the fact that all attorneys of record were required to be served, when three letters go out to counsel and *two* of the three letters—not to mention both letters to *pro bono* attorneys of record—are returned unopened and unclaimed, it is common sense that someone "desirous of actually informing the absentee" would do *something* more. *Mullane*, 339 U.S. at 315; *see Jones*, 547 U.S. at 230 ("[W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."). Ultimately the question is what would someone who actually wanted to provide notice do? On main streets across America, the question practically answers itself: someone who really wanted to provide notice would follow up in some way, even when the third letter did not come back. There is no reason why this Court should reach any different conclusion, especially where the notice at issue concerned a matter of life or death.

3. Of course, the court clerk was not to blame for the fact that the letters were sent back to the court in the first place. *See* JA 302. No question, Ingen-Housz and Munanka should have notified the court when they ceased representing Maples, just as the homeowner in *Jones* should have updated his address (*see* 547 U.S. at

---

[6] In this case, as discussed below, local counsel was not even serving as a "mail drop." As this Court explained in *Jones*, however, "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*." 547 U.S. at 231.

231-32). And the New York mailroom should have had a better system in place to deal with mail to former employees, including where the firm's name is not on the envelope. But by definition, the *Jones* issue arises only when something has "gone awry" on the other end. *Id.* at 226. And the whole point of *Jones* is that it is not enough for the State to simply sit back—when it *learns* notice has not gone through—and say, "Well tough luck, the notice was fairly calculated to reach its intended recipient at the outset." Instead, regardless of *why* things go awry, *Jones* holds that the State has a duty to do something more when it learns that its attempt at notice has failed. *Id.* at 239. Here, the clerk simply stuck the returned letters in a file drawer.

C. The State's Actions Establish Cause

Interference by the State or its officials that impedes a petitioner's ability to comply with the State's procedural rule is a paradigmatic example of cause. *See supra* at 20-21. Here, the State has never denied that, if the clerk had done something more when the notices to Maples's *pro bono* attorneys of record were returned unclaimed—whether trying to reach Ingen-Housz and Munanka through their personal contact information, sending the order directly to Maples in prison, or reaching out to local counsel to inform him that *pro bono* counsel did not receive the notice—the missed deadline would have been prevented. And taking any one of those modest—and, indeed, constitutionally mandated—steps almost certainly would have prevented Maples from missing the deadline for appeal. The State's mishandling of its basic notice obligations therefore provides a sufficient basis to excuse the procedural default at issue.

III. THE CONDUCT OF MAPLES'S POST-CONVICTION COUNSEL ESTABLISHES CAUSE FOR THE DEFAULT

The actions of Maples's attorneys independently establish cause to excuse the procedural default. Whether viewed *from* the standpoint of agency principles, the law governing the attorney-client relationship, or the equitable principles underlying habeas corpus, the attorney conduct underlying the default is not fairly attributable to Maples. Indeed, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). Because the attorney conduct at issue in this case falls into that exceptional category, the conduct is *external* to the petitioner—and therefore also establishes cause for the default.

A. The Court of Appeals Erred Insofar As It Held That Attorney Misconduct Automatically Fails To Constitute Cause

The court of appeals short-circuited any inquiry into whether the actions of Maples's attorneys established cause based on *Coleman*. Pet. App. 17a-18a. In so doing, the court erroneously conflated the question whether attorney conduct *in* post-conviction proceedings may be imputed *to the State* based on a violation of the Sixth Amendment with the distinct question whether attorney conduct is always fairly attributable to the client under the law of agency or other principles. *See id.* at 17a (attorney conduct

"cannot establish cause for [the] default because there is no right to post-conviction counsel").[7]

Coleman's refusal to recognize a Sixth Amendment right to effective assistance of counsel in post-conviction proceedings eliminates the argument that attorney error such as negligence or inadvertence automatically must be "'imputed *to the State*'" because of a constitutional violation. *Coleman*, 501 U.S. at 754 (quoting *Carrier*, 477 U.S. at 488) (emphasis added). But *Coleman* did not consider, much less resolve, the question whether attorney error may be external to the defense because the kind of conduct at issue is not fairly attributable to the petitioner under agency law or the law governing the attorney-client relationship.

Quite apart from whether any Sixth Amendment right is implicated, there are longstanding limits on the attorney misconduct—beyond garden-variety negligence or the like—that may be constructively attributed to a client. As every member of this Court appeared to recognize in *Holland*, those principles are not only informative but operative in the habeas context—at least when the attorney misconduct rises to the level of de facto abandonment or breach of the duty of loyalty. *See Holland*, 130 S. Ct. at 2564-65 (referring to equitable principles, agency principles,

---

[7] Maples has argued that depriving him of federal habeas review on the basis of the kind of attorney conduct at issue would violate his constitutional rights. *E.g.*, Pet. 30-32; *cf. Coleman*, 501 U.S. at 755 (reserving question whether right to counsel extends to instances where collateral review is the first place a prisoner can present a particular challenge to his conviction). However, holding that Maples has established cause because the conduct of his attorneys is not fairly attributable to Maples would obviate the need for the Court to reach that constitutional question here.

and canons of professional responsibilities); *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment) (agency principles); *id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting) (same).

Coleman does not preclude the application of those principles to hold that attorney conduct such as abandonment or disloyalty is external to the defense because the kind of attorney error involved in *Coleman*—mere "inadvertence" or negligence—*is* constructively attributed to the client under settled background principles. 501 U.S. at 753-54 (citing Restatement (Second) of Agency § 242 (1958)); *see Holland*, 130 S. Ct. at 2568 (*Coleman* "rel[ied] on 'well-settled principles of agency law' to determine whether attorney error was attributable to [the] client.'") (Alito, J., concurring in part and concurring in the judgment); *Holland*, 130 S. Ct. at 2571 n.4 ("*Coleman* did not invent, but merely applied, the already established principle that an attorney's acts are his client's.") (Scalia, J., joined by Thomas, J., dissenting); *see also Carrier*, 477 U.S. at 491 (attorney error involving "ignorance or inadvertence" is attributed to the client).

Nor is the application of those principles precluded by this Court's prior precedents recognizing the unquestioned rule that a client is typically "deemed bound by the acts of his lawyer-agent." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *see also, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990); *Smith v. Ayer*, 101 U.S. 320, 325-26 (1880). Those cases, like *Coleman*, involved attorney misconduct that amounted to negligence, inadvertence, or similar failings, which have long been treated as constructively attributable to the client. *See Irwin*, 498 U.S. at 92 (missed deadline due to inadvertence); *Link*,

370 U.S. at 628-29, 634 (inexcusable failure to appear at pretrial conference); *Smith*, 101 U.S. at 325-26 (failure properly to evaluate effect of legal instruments). And it is, of course, "quite impossible" for the Court's holding in those cases—including *Coleman*—"to be any broader" than the facts of the cases. *American Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994).

But not all attorney misconduct is equal. And while most attorney failures are attributed to the client, not all are. For example, as Justice Alito observed in *Holland*, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). And, at a minimum, a petitioner cannot be held constructively responsible for the conduct of an attorney when the lawyer has essentially abandoned him, breached his duty of loyalty to him, or never entered into a meaningful agency relationship with him to begin with. *See id.* at 2564-65; *id.* at 2568-69 (Alito, J., concurring in part and concurring in the judgment); *id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting); *infra* at 39-43.

Courts accordingly have refused to constructively attribute attorney abandonment or disloyalty to clients, including in the habeas context. *See, e.g.*, *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc) (assuming "utter abandonment constitutes extraordinary circumstances 'external to the party's own conduct,'" such that it could not be attributed to a habeas petition) (citation omitted); *Baldayaque v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner

completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'") (citation omitted); *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to client when attorney "does not actually represent the client"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992) (acknowledging that attorney's alleged conflict-of-interest would be "external" factor for default because attorney would have "effectively ceased to be [the client's] agent"); *see also McLaughlin v. Lee*, No. 5:99-HC-436-BO, 2000 WL 34336152, at *3 (E.D.N.C. Oct. 19, 2000) (refusing to hold habeas petitioner responsible when he was "in the extraordinary situation of believing that he had counsel when, in fact, he had counsel in name only").

The court of appeals erred in not considering whether the attorney conduct at issue in this case is external to Maples. At a minimum, the court's failure to do so requires a remand. But for the reasons explained next, this Court should hold that the attorney misconduct here is not fairly attributable to Maples under settled background principles.

B. Attorney Conduct Amounting To Abandonment Or Breach Of Loyalty Is Not Fairly Attributable To The Client

The same basic agency principles to which this Court looked in cases like *Coleman* and *Holland* provide important guideposts for determining when attorney conduct is not fairly attributable to the client. That question is also informed by the law governing the attorney-client relationship as well as the equitable principles underlying habeas corpus.

An agent's authority follows from the premise that "at the time of taking action that has legal

consequences for the principal, the agent reasonably believes ... that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01 (2006). But because "[a]gents are appointed to forward the principal's interests ... when the agent ceases to do this and prefers his own or another's interests, ordinarily the principal no longer would desire the agent to act for him, and this the agent should realize." Restatement (Second) of Agency § 112 cmt. b. An abandonment thus terminates the agency relationship. And indeed, an abandonment itself amounts to a renunciation of the relationship. *See id.* § 119 cmt. b ("The agent may manifest renunciation by conduct inconsistent with the continued performance of his duties to the principal.").

It is also well-settled that a lawyer-agent's authority terminates altogether when he commits "a serious breach of loyalty to the principal." Restatement (Second) of Agency § 112; *accord Holland*, 130 S. Ct. at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting); *see United States v. Galindo*, 871 F.2d 99, 101 (9th Cir. 1989) ("When an agent acts contrary to the interests of the principal, the agency relationship ceases.") (citing, *e.g.*, Restatement (Second) of Agency § 112); *State v. DiGiulio*, 835 P.2d 488, 492 (Ariz. Ct. App. 1992) ("Violating the duty of loyalty, or failing to disclose adverse interests, voids the agency relationship."). Moreover, in such circumstances, neither the lawyer's actions, nor the lawyer's knowledge, may "fairly be attributed" to the client. *See* Restatement (Third) of Agency § 5.04 ("[N]otice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to

act solely for the agent's own purposes or those of another person.").

Abandoning a client is an obvious violation of an agent's basic duty of loyalty. As Professor Mechem explained, "[t]he amount of time which an agent is required to devote to his principal's interests in order to satisfy the requirement of loyalty, must, of course, depend upon the circumstances of the case," but at a minimum "there shall be a fair and reasonable devotion to the business of the principal." *See* 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 1232 (2d ed. 1914). And of course, an attorney who has abandoned his client by definition eschews *any* "devotion to the business of the principal." An agent may also breach the duty of loyalty by taking on added responsibilities or a new master that effectively prevent him from serving the principal's interests. *See* Restatement (Second) of Agency § 394 cmt. a (an "agent commits a breach of duty to his principal by acting for another in an undertaking which has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purpose in mind"); Mechem, *supra*, § 1206 ("The principal has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give his principal that undivided allegiance and loyalty which the proper performance of the agency requires, and that he will remain in that situation.").

Refusing to hold a client constructively responsible for an agent's actions in the case of an abandonment or breach of the duty of loyalty is also consistent with the longstanding rule that the agency relationship automatically terminates even in the *no-fault* situation where an agent becomes incapacitated, dies, or loses a

license essential to the performance of his duties. As Justice Story explained, "[t]he case of the insanity of the agent would seem to constitute a natural, nay, a necessary, revocation of his authority; for the principal cannot be presumed to intend, that acts done for him, and to bind him, shall be done by one, who is incompetent to understand, or to transact, the business which he is employed to execute." Joseph Story, *Commentaries on the Law of Agency* § 487 (1839); *see also* Restatement (Second) of Agency § 111 & illus. 1 ("loss of or failure to acquire" legal qualifications terminates agency). An agent who has abandoned his principal or accepted duties that prevent him from being his agent occupies the same position as an agent who has become incompetent, died, or lost his license. He cannot perform his duties, so the "natural, nay, necessary" conclusion is that the agency terminates.

In *Holland*, this Court also held that "egregious" attorney misconduct that transcends mere negligence and that "violate[s] fundamental canons of professional responsibility" is not fairly attributable to the client for purposes of equitable tolling—which also looks to whether a factor is external to the petitioner. 130 S. Ct. at 2563-65; *see id.* at 2562 (equitable tolling appropriate only when a petitioner can show that an external factor prevented timely filing); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (for equitable tolling, petitioner must show circumstances "external to the party's own conduct"). That conclusion is consistent with traditional agency law when—as was true in *Holland* and is true here—the misconduct rises to the level of abandonment or disloyalty. *See* 130 S. Ct. at 2564; *see id* at 2568 (Alito, J., concurring in part and concurring in the judgment). And it furthers the

equitable principles on which habeas is grounded by ameliorating the grossly inequitable consequences of holding a client responsible for attorney conduct that is properly regarded as external. *See id.* at 2563.

In any event, whether viewed through the lens of agency law or other principles, attorney misconduct that is not constructively attributable to a client is, by definition, "*external* to the petitioner." *Coleman*, 501 U.S. at 753 (emphasis added). As a result, such attorney conduct may constitute cause when it impedes the petitioner's ability to comply with the default rule.

C. The Actions Of Maples's Post-Conviction Counsel Establish Cause

The actions of Maples's attorneys establish cause because those actions are not fairly attributable to Maples. Indeed, as discussed next, none of Maples's attorneys was "operating as his agent in any meaningful sense of that word," *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment), at the time of the default, and their actions constituted a severe breach of the duty of loyalty.

1. Maples's *pro bono* attorneys of record abandoned Maples when they left their firm without notifying the Rule 32 court or substituting counsel. In July 2002, while Maples's Rule 32 petition had been pending before the Alabama trial court for more than a year without any action—and months before the court eventually issued its order denying the petition in May 2003—Ingen-Housz left the country to assume a job for the European Commission in Brussels. Pet. App. 258a. That job prevented her from representing non-

European Commission clients.[8] And during the same summer, *id.*, Munanka left Sullivan & Cromwell to become a law clerk for a federal judge in New York—a position that also precluded him from continuing to work on Maples's case. *See Code of Conduct for Judicial Employees*, Canon 4(D). Both attorneys not only left their representation of Maples without word to the court, but they transferred their loyalties to new principals and undertook new employment that prevented them from representing Maples.

This constituted a material breach of the duty of loyalty. The new jobs that Ingen-Housz and Munanka assumed not only had a "substantial tendency to cause [them] to disregard [their] duty to serve [Maples] with only [Maples's] purpose in mind," Restatement (Second) of Agency § 394 cmt. a; the jobs effectively *barred* them from doing anything on Maples's behalf and thus completely vitiated the "undivided allegiance and loyalty which the proper performance of the agency require[d]," Mechem, *supra*, § 1206. *See, e.g., Cameco, Inc. v. Gedicke*, 690 A.3d 1051, 1057-58 (N.J. Super. Ct. App. Div. 1997) (duty of loyalty violated by side business that significantly impaired employee's performance). Moreover, undertaking a job that prevents an agent from working on a principal's behalf results in the agent's total incapacitation and thus terminates the agency relationship "by operation of

---

[8] Article 12b of the European Commission's Consolidated Staff Regulation requires specific authorization before an employee may engage in outside work of any kind. Staff Regulations of Officials of the European Communities art. 12b (2004), *available at* http://ec.europa.eu/civil_service/docs/toc100_en.pdf. There is no evidence that Ingen-Housz sought such permission and she performed no work for Maples after she left the law firm.

law" based on "a change of condition, or of state, producing an incapacity of either party." Story, *supra*, § 481; *see* Restatement (Third) of Agency § 3.08 cmt. b (rule applies to incapacitation of agent).

Significantly, Ingen-Housz and Munanka were required by Alabama law to obtain the court's approval before withdrawing. Pet. App. 223a; Ala. R. Crim. P. 6.2(b); *see, e.g., McWilliams v. State*, 897 So. 2d 437, 442-43 (Ala. Crim. App. 2004) (citing motions to withdraw filed by out-of-state *pro bono* counsel). Under the Alabama rules, "[c]ounsel must move to withdraw by means of a formal written motion," and "[w]ithdrawal will be permitted only upon order of the court in response to such motion." Ala. R. Crim. P. 6.2 cmt. As the Alabama rules make clear, the purpose of this requirement is "to protect the interests of the defendant, and to aid the trial court in providing continuity in legal representation." *Id.* Counsel's failure to obtain the court's approval to withdraw left Maples abandoned by his *pro bono* attorneys of record.

Courts have recognized that abandonment or disloyalty severed the agency relationship in analogous circumstances. *See, e.g., Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (Petitioner alleged he was "effectively abandoned" where "attorney failed to inform him when the [court] denied review of his motion[,] ... his attorney refused to remove herself as appointed counsel[,] ... [and] his attorney led him to believe that she was going to file the federal habeas petition on his behalf ...."); *Porter v. State*, 2 S.W.3d 73, 74-75 (Ark. 1999) (finding "cause" where attorney of record ceased representation but "had not taken any formal steps to withdraw," precipitating default). And here, the State itself must have believed that Maples

had been abandoned by counsel because, after the default, the State's attorney sent notice to Maples directly without even copying Maples's attorneys of record, Pet. App. 253a-54a—notwithstanding the general ethical rule barring a lawyer from contacting a client that is represented by another lawyer about the underlying matter. *See* Ala. R. of Prof'l Conduct 4.2.

In its brief opposing certiorari, the State never denied that Ingen-Housz and Munanka abandoned Maples. Instead, the State argued that *other* attorneys at Sullivan & Cromwell represented Maples at the time of the default. Opp. 33-35. New counsel from Sullivan & Cromwell advised the Eleventh Circuit that other lawyers at the firm had "agreed to handle the matter" after Ingen-Housz and Munanka left. JA 299; *see* Pet. App. 4a. But the record is largely undeveloped concerning what arrangements had been made and whether or to what extent such attorneys had actually formed an attorney-client relationship with Maples before the default or, whether they instead were just "waiting for any further proceedings" before deciding how to proceed in the matter. JA 301. If this Court believed it was necessary to resolve these issues in deciding whether Maples has established cause, a remand for evidentiary proceedings would be required. But ultimately such a remand is not required because, as a matter of law, the existence of these attorneys cannot alter the fact that Maples was abandoned during the critical time frame based on the findings of the Rule 32 court itself.

As the Alabama Rule 32 court found, no other lawyers at Sullivan & Cromwell represented Maples in his Rule 32 proceeding at the time of the default. Pet. App. 223a. Any other attorneys on which the State

relies had "not yet been admitted to practice in Alabama" and had "not entered appearances as attorneys of record." *Id.*; *see also id.* at 4a. Thus, even *after* the default, the Alabama Rule 32 court made clear that Ingen-Housz and Munanka—who had not withdrawn from the case—were "*still* attorneys of record for [Maples]." *Id.* at 223a (emphasis added); *see Esters v. State*, 894 So. 2d 755, 761 (Ala. Crim. App. 2003) (attorneys' "representation of, and attendant obligations to [the client] exist[] as long as they remain[] attorneys of record"). If any other lawyers had even attempted to file pleadings on Maples's behalf at the time of the default, the pleadings would have been "stricken from the record" and the attorneys disciplined for "unlawful practice of law." JA 372.

As explained above, under traditional agency law, a principal is never responsible for the actions or inactions of a purported agent who lacks a license necessary to the performance of the relevant tasks. *See* Restatement (Second) of Agency § 111; *see id. illus.* 1 ("In a state in which it is illegal for one not an attorney to represent another in court, P authorizes A to appear for him in a case. A is disbarred. A's authority is terminated."). That principle governs here because, as the Rule 32 court found, any other Sullivan & Cromwell attorneys relied upon by the State lacked the authority to represent Maples in his Rule 32 proceeding. Pet. App. 223a. Thus, regardless of who was doing what (if anything) in New York after Ingen-Housz and Munanka had left, Maples was left completely abandoned in his Rule 32 proceeding.[9]

---

[9] The findings of the Alabama Rule 32 court on who represented Maples should control. However, to the extent that any other

2. Maples's local counsel, John Butler, also was not operating as Maples's agent in any meaningful sense of that word. As a practical matter, Butler had abandoned Maples as well, though it could also be said —given that one ordinarily can abandon only that which he has once possessed—that Butler *never* assumed any meaningful agency relationship with Maples in the first place. According to his own testimony, the only role that Butler ever agreed to serve on behalf of Maples was to make possible the out-of-state representation of Maples by his *pro bono* attorneys of record. Pet. App. 255a-56a. Accordingly, besides enabling Ingen-Housz and Munanka to represent Maples *pro hac vice* in the matter, Butler had "no other role in the case." *Id.* at 257a.

To be sure, although it was unfortunately not uncommon for local counsel to take on such a perfunctory role in post-conviction cases in Alabama, *see* Alabama Appellate Court Justices Cert. Br. 18, that arrangement—however it is characterized—violated Alabama law from the get-go. The Alabama rules state that local counsel "shall ... accept joint and several responsibility with the foreign attorney." JA 366, 375. By his own admission, Butler intentionally abandoned such responsibility, Pet. App. 255a-56a, and thus never operated as Maples's agent in any meaningful sense of the word. He was "local counsel" in name only, and thus was no more operating as an agent of Maples than Ingen-Housz and Munanka were

---

attorneys at Sullivan & Cromwell—or indeed the law firm itself—could be deemed to have been Maples's attorneys at the time of the default and such attorneys knew that Maples was left without any functioning attorney of record in his Rule 32 proceeding, then that would simply underscore the abandonment that Maples faced.

after they had left Maples but nevertheless nominally were "still attorneys of record for [Maples]" because they had not withdrawn from the case. *Id.* at 223a.

Consistent with his clearly expressed intentions, Butler did nothing when he received the dispositive Rule 32 order in Maples's case. He did not inform Maples or *pro bono* counsel of the order. He took no action to prepare an appeal on Maples's behalf, or to ensure that Maples's *pro bono* attorneys of record were doing so. Unlike the typical case in which attorney error occurs, that inaction was not the product of negligence or inadvertence on Butler's part. Rather, it was the product of Butler's intentional decision from the very outset to avoid any role that would resemble that of an agent in the meaningful sense of that word. That decision—which was consciously designed to serve *other* interests, *id.* at 255a—not only represents a de facto abandonment but embodies a fundamental breach of the duty of loyalty. Butler failed to serve Maples's interests in any meaningful way and deprived Maples of the "undivided allegiance and loyalty which the proper performance of the agency require[d]." Mechem, *supra*, § 1206. And because Butler was not operating as Maples's agent in any meaningful sense, his knowledge of the Rule 32 order cannot be attributed to Maples under agency law. *See* Restatement (Third) of Agency § 5.04; *supra* at 40-41.

At the very most, Butler could be viewed only as a *sub*-agent of Ingen-Housz and Munanka. Indeed, there is no evidence that Butler ever had any direct communications with Maples, and the Alabama rules explicitly call on the out-of-state *pro bono* counsel who wishes to appear *pro hac vice* to "associate[] in th[e] cause an [Alabama] attorney" who shall appear as local

counsel, Ala. R. for Admission to Ala. Bar VII (2008) (JA 375), directly putting on out-of-state counsel—not the inmate—the onus of "associat[ing]" local counsel. *Cf.* Restatement (Third) of the Law Governing Lawyers § 58 cmt. e (2000) (When a lawyer obtains assistance from a "temporary lawyer who has no direct relationship with the client ... the outside lawyer" is often best thought of as a "subagent."). To the extent that Butler operated as a subagent—rather than as no agent at all—his authority would have automatically terminated when Ingen-Housz and Munanka abandoned Maples. *See* Restatement (Second) of Agency § 137 cmt. a ("[A] subagency terminates if the relations between either the principal and the agent or the agent and subagent are severed ....").

After Butler learned of the default, Butler did purport to act on behalf of Maples and signed at least two filings, including the initial request for relief from the Alabama trial court when Ingen-Housz and Munanka had abandoned Maples and no other attorneys had been admitted to represent Maples *pro hac vice.* JA 235-36, 239-40. But Butler's actions *after* the events at issue can in no way alter the fact that he was not operating as Maples's agent in any meaningful sense of the word when the default occurred. And the same goes for the conduct of the lawyers at Sullivan & Cromwell who subsequently entered appearances in the case and filed papers on behalf of Maples.

3. Viewed from the standpoint of professional standards of care and equitable considerations inherent in habeas, the attorney conduct at issue is also at least as problematic as that in *Holland*, and thus also falls into the category of "extraordinary" circumstances recognized in *Holland* that cannot fairly be attributed

to a petitioner. *E.g.*, 130 S. Ct. at 2562-64; *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment). Indeed, "[a]bandonment of one's (imprisoned) client in a criminal case is one of the most serious offenses a lawyer can commit." *In re Riggs*, 240 F.3d 668, 671 (7th Cir. 2001) (Easterbrook, J.).

Just as in *Holland*, the actions of Maples's *pro bono* attorneys and local counsel violated fundamental professional standards of care as well as principles of agency. For example, by leaving the case without even notifying the court, Maples's *pro bono* attorneys of record violated their obligation under Alabama law to obtain the court's *approval* before withdrawing—as this case underscores, a critically important duty. *See* Ala. R. Crim. P. 6.2(b). By assuming new employment that precluded them from working on Maples's case, those attorneys also violated Alabama's "conflict of interest" rules. *See* Ala. R. of Prof'l Conduct 1.7 ("A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer's responsibilities to a another client ....") (emphasis added). By intentionally limiting his involvement to facilitating the representation by Maples's out-of-state *pro bono* counsel, Butler egregiously violated his duty to assume "joint and several responsibility" in the matter. Rule VII(c) of the Ala. Rules of Practice; JA 366, 375. And, as discussed, in abandoning him, Maples's attorneys also violated their fundamental duties of loyalty and obedience to Maples.

In sum, whether measured by agency law, standards of professional care, equitable principles, or just plain common sense, the conduct of Maples's attorneys cannot fairly be attributed to Maples. In other words, that conduct is *external* to Maples and

thus establishes cause for excusing the default. Moreover, while the conduct of Maples's *pro bono* attorneys and that of local counsel together establishes cause, the conduct of either is sufficient to establish cause under the extraordinary circumstances of this case because the conduct of either alone constituted a substantial "external impediment" to Maples's ability to appeal. *Carrier*, 477 U.S. at 492.

* * * * *

No sustainable system of capital punishment would mandate the execution of a man in the circumstances here without any federal habeas review of the inmate's constitutional claims on the merits. And this Court's precedents—backed by centuries of jurisprudence recognizing the equitable nature of the writ—already supply the necessary safeguard. Cause exists to excuse a procedural default where some objective factor external to the defense impeded the petitioner's efforts to comply with the State's default rule. Because Maples's ability to comply with the State's default rule was impeded, if not completely thwarted, by external events including the State's own misconduct, the courts below erred in holding that Maples could be executed without any federal review of the merits of his serious ineffective-assistance-of-counsel claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

May 18, 2011

Counsel for Petitioner

RESPONDENT'S BRIEF

AND BRIEFS

JUN 30

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,
v.
KIM T. THOMAS,
COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General
*Counsel of Record

Nicholas Q. Rosenkranz
Deputy Attorney General

William G. Parker, Jr.
Assistant Attorney General

600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-4026

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

June 30, 2011

CAPITAL CASE

QUESTION PRESENTED

In *Coleman v. Thompson*, this Court held that a lawyer's error in failing to properly appeal in state habeas proceedings could not constitute "cause" excusing the default. 501 U.S. 722, 757 (1991). Here, Cory Maples failed to properly appeal an adverse order in Alabama state habeas proceedings. This case presents the following question:

Whether the Eleventh Circuit properly held that Maples had not established cause to excuse his procedural default where Maples's team of attorneys was actively representing him at the time of the default, where the clerk delivered a copy of the court's order to one of Maples's attorneys of record, and where the mistakes of Maples's attorneys caused the default.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Proceedings on direct review 3

1. Guilt phase 3

2. Penalty phase 5

3. Direct appeal 6

B. State habeas proceedings 7

1. Maples's missed deadline 9

2. Maples's attorneys' mistakes 9

3. Proceedings after the default 11

C. Federal habeas proceedings 12

1. Maples's District Court filings 12

2. Maples's Eleventh Circuit filings 13

SUMMARY OF THE ARGUMENT 15

ARGUMENT 18

I. This Court's decision in *Coleman* precludes Maples from establishing cause. 18

II. The clerk's actions do not establish cause to excuse Maples's default. 23

A. Maples waived the clerk argument. 24

B. The clerk complied with state and federal law. 24

1. The clerk's actions satisfied state law. 25

2. The clerk's actions satisfied due process. 27

a. The clerk's actions satisfied due process because Butler received the order. 28

b. The receipt of the notice by Butler makes *Jones v. Flowers* irrelevant here. 29

c. Further action by the clerk was not necessary. 32

C. Even if the clerk had erred, his actions would not establish cause. 35

III. The acts of Maples's legal team do not establish cause to excuse his default. 37

A. De Leeuw and Butler represented Maples from the outset. 38

1. Maples established an attorney-client relationship with De Leeuw and others before the default. 38

a. Maples established an attorney-client relationship with S&C before the default. 39

b. In the very least, Maples established an attorney-client

relationship with De Leeuw and others before the default.....40

2. Maples established an attorney-client relationship with Butler before the default.....42

B. Because the team's attorney-client relationship with Maples did not terminate before the default, their actions did not establish cause. 45

1. Ingen-Housz and Munanka's departures are irrelevant to the cause question.....46

2. The team's attorney-client relationship did not terminate based on any breach of the duty of loyalty.....48

3. The team's agency relationship was not terminated by "abandonment." 51

CONCLUSION.....56

TABLE OF AUTHORITIES

Cases

Allen v. Pac. Bell
212 F. Supp. 2d 1180 (C.D. Cal. 2002) 26

Ashby Enters. v. Weitzman, Dym & Assocs.
780 F.2d 1043 (CADC 1985) 33

Baldayaque v. United States
338 F.3d 145 (CA2 2003) 48

Beyond Sys., Inc. v. Realtime Gaming Holding Co.
878 A.2d 567 (Md. 2005) 44

Bradshaw v. Richey
546 U.S. 74 (2005) 25

Buchanan v. Sherrill
51 F.3d 227 (CA10 1995) 26

Coleman v. Thompson
501 U.S. 722 (1991) ..... passim

Daniel Int'l Corp. v. Fischbach & Moore, Inc.
916 F.2d 1061 (CA5 1990) 26

Edwards v. Carpenter
529 U.S. 446 (2000) 22

Elmendorf v. Taylor
23 U.S. (10 Wheat.) 152 (1825) 25

Engle v. Isaac
456 U.S. 107 (1982) 20

Ex parte Henry
770 So. 2d 76 (Ala. 2000) 31

Ex parte Ingram
675 So. 2d 863 (Ala. 1996) 6

Ex parte Maples
758 So. 2d 81 (Ala. 1999) 7

Ex parte Stephens
676 So. 2d 1307 (Ala. 1996) 31

Fairman v. Anderson
188 F.3d 635 (CA5 1999) 54

Fortner v. Balkcom
380 F.2d 816 (CA5 1967) 35

Harris v. Nelson
394 U.S. 286 (1969) 35

Hill v. Mendenhall
88 U.S. (21 Wall.) 453 (1874) 29

Holland v. Florida
130 S. Ct. 2549 (2010) ..... passim

In re Furlong
885 F.2d 815 (CA11 1989) 28

Irwin v. Dep't of Veterans Affairs
498 U.S. 89 (1990) 21, 28, 54

Jamison v. Lockhart
975 F.2d 1377 (CA8 1992) 48

Jones v. Flowers
547 U.S. 220 (2006) ..... passim

Kingvision Pay-Per-View, Ltd. v. Ayers
886 So. 2d 45 (Ala. 2003) 29

Link v. Wabash R.R.
370 U.S. 626 (1962) 21, 28, 54

Manning v. Foster
224 F.3d 1129 (CA9 2000) 48

Maples v. Alabama
531 U.S. 830 (2000) 7

Martinez v. Ryan
No. 10-1001 22

McCleskey v. Zant
499 U.S. 467 (1991) 16, 36

Mullane v. Cent. Hanover Bank & Trust
339 U.S. 306 (1950) 28, 30, 32, 33

Murray v. Carrier
477 U.S. 478 (1986) 20, 35, 38, 54

Nara v. Frank
264 F.3d 310 (CA3 2001) 47

Panzino v. City of Phoenix
999 P.2d 198 (Ariz. 2000) 51

People v. Pilkington
156 P.3d 477 (Colo. 2007) 44

Porter v. State
2 S.W.3d 73 (Ark. 1999) 47

Schlup v. Delo
513 U.S. 298 (1995) 20

State v. DiGiulio
835 P.2d 488 (Ariz. Ct. App. 1992) 49

State v. Wall
910 A.2d 1253 (N.H. 2006) 44

Stewart v. LaGrand
526 U.S. 115 (1999) 24

Thomas v. Kellett
489 So. 2d 554 (Ala. 1986) 26

United States v. $184,505.01 in U.S. Currency
72 F.3d 1160 (CA3 1995) 33

United States v. Everett
700 F.2d 900 (CA3 1983) 28

United States v. Galindo
871 F.2d 99 (CA9 1989) 49

United Student Aid Funds v. Espinosa
130 S. Ct. 1367 (2010) 28

Williams v. State
710 So. 2d 1276 (Ala. Crim. App. 1996) 5

Withrow v. Williams
507 U.S. 680 (1993) 27

Statutes

28 U.S.C. §2254 ..... 27, 55

ALA. CODE §13A-3-1 (1975) 5

ALA. CODE §13A-3-2 (1975) 5

ALA. CODE §13A-5-40 (1975) 4

ALA. CODE §13A-5-54 (1975) 3

Rules

ABA MODEL RULES PROF'L CONDUCT R. 1.3 49

ABA MODEL RULES PROF'L CONDUCT R. 1.7 49

ALA. R. APP. P. 4 ..... 9, 33

ALA. R. CRIM. P. 34.4 .....25, 30

ALA. R. CRIM. P. 34.5 26

ALA. R. PROF. CONDUCT 5.1 47

FED. R. CIV. P. 5 25

FED. R. CIV. P. 77 .....27, 33

FED. R. CRIM. P. 49 .....25, 27, 33

N.Y. CODE PROF'L RESPONSIBILITY DR 1-10422 N.Y.C.R.R. §1200.5 (2002) 47

Other Authorities

Brief in Opposition, *Barbour v. Allen*, No. 06-10605 31

Friendly, Henry, *Is Innocent Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) 20

MECHEM, 1, A TREATISE ON THE LAW OF AGENCY §1232, at 903 (2d ed. 1914) 50

RESTATEMENT (SECOND) OF AGENCY (1958)

§§105-24 51

§118 53

§111 42

§112 48

§242 21

RESTATEMENT (THIRD) OF AGENCY (2006)

§2.01 44

§§3.06-3.11 51

§5.04 49

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000)

§14 41

§19 43

§27 28

§31 ..... 39, 40

§33 46

REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §68 (2d ed. 1990) 49

WRIGHT & MILLER, 4B, FEDERAL PRACTICE & PROCEDURE (3d ed. 2002) 26, 34

INTRODUCTION

The two most important names in this case are De Leeuw and *Coleman*. Maples fails to mention the first and ignores the significance of the second.

Marc De Leeuw is the Sullivan & Cromwell partner who worked on Maples's postconviction case from its inception in state court through the proceedings in the Eleventh Circuit. When former S&C associates Clara Ingen-Housz and Jaasi Munanka left the firm, they hardly slipped off in the middle of the night, cold-heartedly abandoning their client and leaving him without a lawyer. Instead, as De Leeuw told both the District Court and the Eleventh Circuit, he continued to work on Maples's case at that time, assuming responsibility for the matter within the firm, long before the state court issued its order. And as De Leeuw told the District Court, Maples was represented by S&C itself throughout the state-court litigation. Maples missed his deadline because De Leeuw and other S&C lawyers mistakenly failed to file notices of appearance in the Alabama litigation, and mistakenly assumed that Ingen-Housz's and Munanka's mail would simply be forwarded to them.

Coleman v. Thompson, meanwhile, is the decision that controls this case. *Coleman* held that a postconviction lawyer's "fail[ure] to act, in furtherance of the litigation," by filing a timely appeal of an adverse trial-court order cannot be grounds for excusing the petitioner's resulting state-court default. 501 U.S. 722, 753 (1991). In these circumstances, "the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation." *Id.* at 754. *Coleman* concluded that in the absence of a showing that the

petitioner is actually innocent, the principles underlying our system of federal habeas review—including its interests not only in vindicating the innocent, but also in protecting the finality of state-court criminal judgments—are best served by not excusing a petitioner from this sort of default.

Maples makes no claim of actual innocence, and does not question *Coleman* or ask this Court to overrule it. He instead seeks two ways past it, but neither is tenable.

First, in light of local counsel John Butler's actual receipt of the order, Maples has no viable claim that the trial-court clerk violated due process. Actual notice to a litigant's attorney is more than the Due Process Clause requires, and because Butler received the order, the clerk had no reason to issue further notice.

Second, in light of the role De Leeuw and others played throughout the case, Maples has no viable argument that any of his lawyers "abandoned" him, temporarily or otherwise. When Maples missed his deadline, he was represented by a team of lawyers. Maples defaulted not because they abandoned him, but simply because they made mistakes.

Maples is unquestionably guilty of murdering two people, and his conviction is now 15 years old. He has received some form of judicial review of every claim he has made. *Coleman* was correct to hold that in light of the principles underlying the Great Writ, these sorts of attorney mistakes are not cause to excuse a state procedural default.

STATEMENT OF THE CASE

A. Proceedings on direct review

No one disputes that after a late night 15 years ago, Cory Maples shot two friends in what the Eleventh Circuit called "an execution-style killing." Pet. App. 2a. The police apprehended him two weeks later in Tennessee, where he fled in a car stolen from one of his victims. Maples then confessed in writing that "[s]ometime around midnight on the night of Friday, July 8, 1995, I shot and killed two boys while they sat in a car in the driveway of my home." JA 289. He claimed he didn't "know why" he "did all this." JA 291. Although he had consumed six or seven beers by about 8 p.m., he "didn't feel very drunk," and he had pulled the trigger some four hours later. JA 290. Maples later gave a videotaped confession that the jury watched at trial. R. 2705-07.[1]

1. Guilt phase

Maples's trial lawyers provided him with effective assistance. Alabama law required any team of appointed capital-defense attorneys to have one member with at least five years in the active practice of criminal law, *see* ALA. CODE §13A-5-54 (1975), and at least one of Maples's attorneys had "been in capital cases before," R. 3081. In light of their client's confessions and the wall of evidence against him, they sensibly opted for what the Alabama Court of

---

[1] For record materials from Maples's trial, this brief uses Maples's citation format. *See* Blue Br. 7 n.1; *see also* Doc 30 (placing these materials in the record before the District Court).

Criminal Appeals would later call a "defense strategy" of not trying to win his acquittal outright, but instead trying to take the death penalty off the table. JA 20.

They did so by arguing that the prosecution could not prove either of the proffered grounds for treating the murders as capital offenses.

- First, to rebut the prosecution's claim that Maples killed two people "pursuant to one scheme or course of conduct," ALA. CODE §13A-5-40 (1975), the lawyers argued that because the bodies were found separately, the victims might have been killed at "separate and distinct times" and that one of them might have been killed by someone else. R. 2937.
- Second, to rebut the prosecution's claim that Maples's offense was part of a premeditated car robbery, *see* ALA. CODE §13A-5-40(2), they argued that the murders, though committed at distinct times, had been the result of an "instantaneous rush" instead of a plan to steal a car. R. 2918, 2926; JA 33. Fearing that the jury might conclude that the killings were part of a scheme to sell the car for drug money, they argued that Maples had not been using drugs at the time of the murders. JA 293-96.

By arguing that Maples had not been using drugs at the time of the killings, counsel did effectively foreclose any argument that Maples was guilty of no more than manslaughter because he had been intoxicated on drugs when he killed the two victims.

But this was an eminently sensible strategic choice in light of his confessions and the standard for the intoxication defense in Alabama. Under Alabama law, only intoxication "so extreme" as to "amount[] to insanity" may render a defendant incapable of forming the requisite intent to commit murder. *Williams v. State*, 710 So. 2d 1276, 1332 (Ala. Crim. App. 1996) (citing ALA. CODE §§13A-3-1 & -2). Maples's own statements to the police—in which he denied drug use and said he had not been drunk, JA 290, 293—would have demolished any intoxication defense. And there was no evidence that he was sufficiently under the influence by the time of the murders, four hours after he took his last drink, to make the intoxication argument work. JA 290.

2. Penalty phase

Maples received effective assistance at the penalty phase as well. Maples's lawyer did joke with the jury during opening statements that he might later "appear to be stumbling around in the dark." R. 3082. But he told them the *reason* was that although he had "been in capital cases before," he and his clients had never been "at this part." *Id.* at 3081. In other words, the jurors were to surmise, his clients had always been acquitted. The message, then, was that he represented clients he believed in, that he was credible, and that he knew how to win.

The presentation he and co-counsel made was consistent with that message. They offered the testimony of a clinical psychologist, who opined that Maples's personality was consistent with "passive aggressive personality disorder." R. 3094, 3137-39, 3149-50, 3172-73. Family members also testified to

points Maples now criticizes counsel for failing to investigate: his previous problems with drugs and alcohol (R. 3174, 3182-83, 3191-92, 3198-99); his voluntary admission to drug rehab (R. 3183-84, 3199-3200); his abuse and abandonment by a mentally troubled mother (R. 3178, 3180-82, 3191, 3194-98); and his general character (R. 3186, 3192, 3200).

Counsel's presentation swayed two jurors. But ten others saw things differently. The court, exercising its independent judgment, accepted the jury's advisory recommendation and sentenced Maples to death.

3. Direct appeal

If Maples is asserting that Alabama law foreclosed a criminal defendant from "challeng[ing]" on direct appeal "the effectiveness of the assistance that he received from counsel at trial," Blue Br. 9, then he is mistaken about that. Alabama law provided that "newly appointed appellate counsel" may raise ineffective-assistance claims by filing a motion for a new trial within 30 days of the trial court's judgment. *Ex parte Ingram*, 675 So. 2d 863, 864 (Ala. 1996). Any defendant who filed such a motion could pursue those claims, through state-appointed counsel, on direct appeal.

Here, Maples retained new counsel for the appeal—but not until after his trial counsel, at the court's request, R. 3390, filed his new-trial motion. He thus did not assert any ineffective-assistance claims at that point. His appellate lawyers did, however, argue that the trial court should have instructed the jury *sua sponte* on intoxication and

manslaughter. The Alabama Court of Criminal Appeals rejected that argument, finding that "[t]he testimony at trial did not establish that the appellant was intoxicated at the time of the murders," and "instructions on intoxication and manslaughter would have been inconsistent with his defense strategy." JA 20. The Alabama Supreme Court affirmed, *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999), and this Court denied certiorari, *Maples v. Alabama*, 531 U.S. 830 (2000).

B. State habeas proceedings

A team of lawyers—several from a firm in New York, and one from a firm in Alabama—agreed to represent Maples in his state postconviction proceedings. It was these lawyers' mistakes that led to the procedural default at issue here.

The New York firm was Sullivan & Cromwell, and contrary to what Maples and his *amici* assert in this Court, the record definitively establishes that Maples had an attorney-client relationship with the firm. In the amended habeas petition he filed with the District Court, he alleged that "[a]t the time" he filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. Likewise, in an affidavit, Maples simply referred to his attorneys as "my lawyers at Sullivan and Cromwell." JA 253. Although S&C partner Marc De Leeuw did once tell the state courts that "[l]awyers at S&C handle *pro bono* cases on an individual basis," Pet. App. 257a, Maples and his lawyers never made any representation of that sort before either the District Court or Court of Appeals, and the federal courts

adjudicated this case based on the allegations in the federal petition.

Maples and his lawyers had good reasons to take the position they took in federal court. As Maples's ethics-scholar *amici* explain, any assertion that the S&C lawyers were handling the case exclusively on an "individual basis" would have been "contradicted" by the firm's public statements "tout[ing]" its "pro bono program." Ethics Br. 10-11. It also would have been "belie[d]" by the fact that these lawyers were using S&C's resources when representing Maples. *Id.* at 11.

At least three of the firm's lawyers were involved at the outset. Associates Clara Ingen-Housz and Jaasi Munanka appeared of record for Maples on the state-court petition he filed in August 2001. De Leeuw did not appear of record but was also "involved in this case" at that time. Pet. App. 257a. Alabama attorney John Butler appeared as local counsel. By signing on, he accepted, under the Rules Governing Admission to the Alabama State Bar, "joint and several responsibility with the foreign attorney." JA 366. That responsibility ran "to the client, to opposing parties and counsel, and to the court . . . in all matters arising from" Maples's case. *Id.*

Butler, Ingen-Housz, and Munanka filed a 92-page petition for Maples, raising numerous claims of ineffective assistance of counsel. JA 22. The court denied the State's motion to dismiss in late 2001, and Butler, Ingen-Housz, and Munanka each received a copy of the order. JA 228, Pet. App. 258a. Maples's lawyers accordingly set about preparing for an evidentiary hearing they had requested, Pet. App.

258a, and met "periodically" with their client, JA 257.

1. Maples's missed deadline

The trial court, meanwhile, did not enter any more orders until May 2003. At that point, the court—presided over by the same judge who had witnessed trial counsel's performance first-hand—denied Maples's petition. JA 146-225.

Under Alabama law, Maples and his legal team had 42 days—or until July 7, 2003—to file a notice of appeal. *See* ALA. R. APP. P. 4(a). But they did not file one. About a month after the deadline passed, Assistant Attorney General Jon Hayden wrote Maples directly, informing him that he had missed the deadline and that his "time for filing a habeas petition in federal court . . . will expire on or about September 9, 2003." Pet. App. 253a-254a.

Maples called his stepmother, and she called S&C. Maples's legal team—the New York lawyers and Butler—leapt into action.

2. Maples's attorneys' mistakes

In the flurry of state and federal filings that followed, Maples's lawyers revealed that their client had missed the deadline because of a series of mistakes they had made.

At S&C, De Leeuw, who had been working on the case with Ingen-Housz and Munanka from the beginning, had "assumed responsibility" for the case within the firm in 2002. JA 228, 273, 299. Ingen-Housz and Munanka had left the firm in the summer of that year, some 10 months before the court issued

the order. Ingen-Housz had gone to Belgium, while Munanka had accepted a clerkship with a federal judge. JA 228. When they left, they did not take Maples with them as a client. He instead remained a client of De Leeuw and at least one associate, Felice Duffy, who joined Maples's team in October 2002. JA 231. Likewise, Gary Alexion, an attorney at the Legal Aid Society in New York, had been working on Maples's case since at least September 2002. Doc 2 – Pg 1. There is no indication that Maples was unaware of these arrangements. To the contrary, in the time between the order denying the State's motion to dismiss in late 2001 and the order denying Maples's petition in 2003, Maples "periodically met with his lawyers." JA 257.

But De Leeuw and the other lawyers in New York failed to seek *pro hac* admission and appear in the Alabama court after Ingen-Housz and Munanka left. Nor did any partners supervising Ingen-Housz and Munanka ensure that the two associates withdrew from the case. Instead, De Leeuw simply assumed that the firm's mailroom would forward, to the lawyers who "ha[d] taken responsibility for that matter," any notices the court sent Ingen-Housz and Munanka. JA 303.

De Leeuw's assumption turned out to be mistaken. The trial-court clerk sent two copies of the order, separately addressed to Ingen-Housz and Munanka, to their address of record with the court—namely, the Manhattan address where S&C keeps its office. Pet. Reply Add. 7a-8a. Instead of forwarding the envelopes to De Leeuw and the others, S&C's mailroom marked them return to sender, and wrote, on Ingen-Housz's, "Left Firm."

Pet. Reply Add. 7a–8a. The envelopes then went back to the clerk. JA 228-29, 257, 262.

Butler, meanwhile, received the order. But he mistakenly "assum[ed]" that the S&C lawyers "would handle the contemplated appeal" because despite his joint and several responsibility for the case, his role had been "limited to moving for the admission of the Sullivan & Cromwell attorneys." JA 257-58. He therefore "did nothing" when the order came across his desk. JA 257.

3. Proceedings after the default

After De Leeuw, Butler, and the others learned that they had missed the deadline, Butler found his copy of the order and sent it to S&C. Pet. App. 256a. The team then quickly prepared, and Butler filed, a motion asking the trial court to reissue its order so Maples could file an appeal within the deadline. That court declined, finding that reissuing the order "would perpetrate subterfuge on the appellate court." Pet. App. 222a-225a. Butler, De Leeuw, and Duffy then asked the Alabama Court of Criminal Appeals, in a petition Butler signed, for an out-of-time appeal. JA 235-36. The court denied that petition, finding that Maples "failed to show that his right to procedural due process was violated" or that the clerk had mishandled its state-law notice obligations. Pet. App. 236a. Butler and De Leeuw then asked the Alabama Supreme Court to grant their client an out-of-time appeal. JA 237-38. After that court denied the petition, Butler, De Leeuw, Duffy, Alexion, and others unsuccessfully sought certiorari in this Court. JA 241-42.

C. Federal habeas proceedings

In the meantime, Butler, De Leeuw, and Alexion filed a federal habeas petition for Maples. JA 226-30. It raised not only the ineffective-assistance claims he had defaulted before the state postconviction court, but also additional federal claims he had preserved on direct review.

1. Maples's District Court filings

When the State asserted the procedural bar in its answer, Maples fired back with a cause-and-prejudice argument that asserted, at most, only one of the theories he is now pressing in this Court. In that argument, he criticized the state court for making "no attempt to have the order forwarded to Mr. Maples or to contact local counsel to clear up any ambiguity regarding Mr. Maples' representation or the appropriate mechanism for delivery of this time-sensitive document." JA 262. Nowhere, however, did he cite the Due Process Clause.

Likewise, his petition and reply did not assert that his legal team had abandoned him during the state-court proceedings. To the contrary, Maples personally acknowledged that he had lawyers at the time of the default. The court had issued a standard order requiring him to submit a memo specifying, among other things, whether he was "fully satisfied with the representation of his habeas counsel and waives any complaint as to counsel's competency." JA 247. Maples's signed response stated "that something happened in the Alabama state courts that meant that I was not able to appeal because my

lawyers at Sullivan and Cromwell in New York didn't get the decision from the Alabama court in time to file the appeal," JA 253. He elaborated that "[m]y lawyers told me that the papers that got sent to them ended up being returned to the court clerk because two of the lawyers who were working on the case left the law firm." *Id.* Likewise, "[t]here was a local lawyer, Mr. Butler, who got the decision but never sent it along to the lawyers in New York." *Id.* Maples not only acknowledged that he had lawyers at the time of the default, but also emphasized that he "want[ed] the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers because I feel that they will do everything they can for me." *Id.*

The court denied his habeas petition, finding the ineffective-assistance claims barred on the ground that "the ineffectiveness of postconviction counsel cannot establish the cause and prejudice necessary to overcome Maples's procedural default." Pet. App. 55a. The court also denied, on the merits, several additional claims Maples had preserved on direct review. Pet. App. 56a-202a.

2. Maples's Eleventh Circuit filings

Maples did not assert any "abandonment" theory before the Eleventh Circuit; and he disclaimed his earlier argument about the clerk. When the State accused him of trying "to shift the blame from his post-conviction attorneys to the circuit clerk," JA 281, Maples called that a "straw-man argument" and said that the "cause" was, instead, "a mailroom oversight." JA 286. If there was any ambiguity about which mailroom he was referring to, De Leeuw

cleared it up at oral argument. "The whole procedural bar," he told the panel, "comes down to a mail room error that was made in New York." JA 299. De Leeuw then told the Court that to "dispel I think an argument the State has made and perhaps suggested, Mr. Maples is not blaming this on the Clerk of the Circuit Court." JA 302.

Because Maples never made any argument that he had been abandoned and expressly disclaimed his prior attempt to blame the clerk, the Eleventh Circuit addressed neither of the theories Maples is now pressing before this Court. The court noted De Leeuw's representations "at oral argument" that "arrangements had been made within the firm for other attorneys at Sullivan & Cromwell to take over representation of Maples" and that "due to a clerical error in the Sullivan & Cromwell mailroom, the firm instead returned the Rule 32 Order to the trial court clerk." Pet. App. 4a & n.3. Based on these representations, the court concluded that "the factor that resulted in Maples's default—namely, counsel's failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel." Pet. App. 17a. Although Judge Barkett dissented on a different question, she took no issue with the majority's analysis of the cause-and-prejudice issue. Indeed, she expressly acknowledged that the default was "entirely the fault of his post-conviction counsel." Pet. App. 30a.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that Maples could not establish cause to excuse his default in light of *Coleman v. Thompson*, 501 U.S. 722 (1991).

I. This case is indistinguishable from *Coleman*. The capital petitioner there failed to appeal in postconviction proceedings, and the Court held that his lawyer's mistakes could not establish cause to excuse the default. In light of the States' interests in federalism and finality—and because the petitioner had no right to counsel to appeal the order—the Court saw "no inequity" in requiring him to bear the risk of the error.

Likewise, Maples failed to appeal because of errors made by his postconviction lawyers. Marc De Leeuw and others in New York mistakenly failed to appear and assumed that orders sent to their departed colleagues would be forwarded to them. Local counsel John Butler mistakenly assumed that other members of the team would handle the appeal. In light of *Coleman*, Maples must bear the risk of those errors.

II. Maples cannot shift the blame for the default to the court clerk. This Court should not reach this argument because Maples disclaimed it in the Eleventh Circuit. In any event, the clerk complied with state law. The Alabama Court of Criminal Appeals held that when a party is represented by multiple counsel of record, service on any one of them is sufficient under Alabama law. Its decision on that state-law matter is dispositive.

The Alabama court also correctly found that the clerk's actions were consistent with due process

because Maples received actual notice through Butler. Because the notice made its way to that attorney of record, the returned envelopes from Sullivan & Cromwell did not signal that Maples had not received notice. For that reason, *Jones v. Flowers*, 547 U.S. 220 (2006), is inapposite. Butler had joint and several responsibility for the case under Alabama law. The clerk could not have taken any steps here that would have been more reasonable than serving Butler was.

Even if Maples had established a due-process violation, he has not established cause. Each step he believes the clerk should have taken would not have been necessary but for his own attorneys' errors. A petitioner cannot establish cause to excuse a default if the defense was not making "efforts" to comply with the rule. *See McCleskey v. Zant*, 499 U.S. 467, 473 (1991).

III. Maples cannot circumvent *Coleman* by arguing that the attorneys who made the mistakes were, at least temporarily, "external" to his defense.

De Leeuw and S&C established an attorney-client relationship with Maples long before the default. The record establishes that "[a]t the time" Maples filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. De Leeuw was also personally representing Maples at that time. When Ingen-Housz and Munanka left the firm, De Leeuw assumed lead responsibility, and other lawyers began working on the case soon thereafter. Maples assented to those arrangements. The failure by De Leeuw and the others to seek *pro hac* admission and file appearances was one of the mistakes that led to the default.

Butler was also part of Maples's team. Although Butler did not have substantive involvement, attorneys on legal teams often divide responsibility amongst themselves, with some playing more significant roles than others. Butler failed to file the notice of appeal not because he was not Maples's attorney, but because he mistakenly assumed that others on the team would handle the appeal. Butler's actions in response to the default confirm that he and Maples had an attorney-client relationship throughout.

Maples's attorney-client relationship with his team did not terminate before the default. Ingen-Housz and Munanka's departures are irrelevant to the cause question. These associates did not abandon their client or breach their duty of loyalty to him. They simply left their firm, and sensibly left the case in a partner's hands.

The remaining members of Maples's team did not breach their duty of loyalty to Maples or abandon him. Maples has not alleged that his lawyers had a conflict of interest that caused them to miss the deadline. To whatever extent lack of diligence can ever rise to a breach of loyalty, that did not happen here. Maples's team was preparing for the hearing and meeting periodically with its client.

For similar reasons, the team did not terminate their agency relationship with Maples by "abandoning" him. This case thus does not resemble *Holland v. Florida*, 130 S. Ct. 2549 (2010). Maples made no attempt to terminate counsel, and affirmatively requested that they remain his attorneys after the default. They did so, representing him in proceedings through the Eleventh Circuit.

These lawyers did not abandon their client, temporarily or otherwise. They simply made mistakes, and under *Coleman* those mistakes are attributable to Maples.

ARGUMENT

Maples's failure to appeal was the direct result of errors committed by De Leeuw and others on his postconviction legal team. That makes this case exactly like *Coleman*, which held that, in light of the principles of federalism and finality underlying our system of habeas-corpus review, petitioners who make no claim of actual innocence must "bear the burden" of their postconviction counsel's mistaken "failure to" appeal an adverse trial-court order. 501 U.S. 722, 754 (1991). Maples cannot get around that principle by now reversing course and pinning the blame on a court clerk whose actions were fully consistent with the law. He cannot get around it by pointing the finger at the two departed Sullivan & Cromwell associates from whom De Leeuw took lead responsibility, with Maples's consent, for the case. And he cannot evade *Coleman* by claiming that his local counsel was, for a brief moment, not his lawyer.

I. This Court's decision in *Coleman* precludes Maples from establishing cause.

The procedural history of this case is a virtual replay of *Coleman*'s. Both Coleman and Maples were found guilty of capital crimes and sentenced to death. *Compare* 501 U.S. at 726-27, *with* Pet. App. 1a. After their convictions, both unsuccessfully

appealed. *Compare* 501 U.S. at 727, *with* Pet. App. 2a. Both then presented ineffective-assistance claims to state postconviction courts, and those courts denied relief. *Compare* 501 U.S. at 727, *with* Pet. App. 3a, *and* JA 151-224. Then, due to mistakes made by their postconviction attorneys, both failed to meet their deadlines to appeal those rulings. *Compare* 501 U.S. at 727-28, *with* Pet. App. 4a.

Coleman and Maples also followed parallel tracks in federal court. Both asserted claims in their habeas petitions that ordinarily would be barred because they missed their appeal deadlines in state court. *Compare* 501 U.S. at 729-44, *with* Pet. App. 10a-16a. Neither argued that his default should be excused because he was actually innocent. Instead, both insisted that although those missed deadlines were caused by the mistakes of their attorneys, they could establish "cause" to excuse their defaults because they were not personally to blame. *Compare* 501 U.S. at 752, *with* JA 272-73, 275.

In *Coleman*, this Court held that the petitioner was required to "bear the risk" of his attorney's mistakes. 501 U.S. at 754. In reaching that conclusion, *Coleman* issued four holdings that require the same outcome in the case at hand.

First, the Court held that unless someone in Coleman's or Maples's shoes can show that a miscarriage of justice would result from the default (a concept this Court would later equate with a showing of actual innocence), his federal claims will be procedurally barred unless he establishes "cause" for his default and "actual prejudice" therefrom. *Id.* at 750. The Court adopted this rule because of concern about the high costs of federal habeas

review. "These costs are particularly high," *Coleman* explained, "when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court" and thereby keeps the state court from correcting any asserted error before it is too late. *Id.* at 748. If the federal court later orders relief, the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982). These costs are unwarranted because "'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.'" *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (quoting Henry Friendly, *Is Innocent Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970)).

Second, the Court explained that the same equitable concerns required a narrow definition of "cause." Cause exists only when some objective factor "external" to the defense "impeded" counsel's "efforts" to comply with the procedural rule. *Coleman*, 501 U.S. at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A paradigmatic example is a tornado that destroys a lawyer's office and thereby impedes a petitioner's diligent efforts to make a filing. *See* Blue Br. 21. Another is "interference by officials"—a warden, say, who raids a prisoner's cell and destroys the petition he is set to mail the next day. *Coleman*, 501 U.S. at 753. So, too, is error by a criminal-defense attorney that violates the petitioner's Sixth Amendment right to counsel. In that circumstance, the Constitution "itself requires that responsibility for the default be imputed to the State." *Carrier*, 477 U.S. at 488.

Third, the *Coleman* Court explained that when a default results from an attorney's error that does not violate the petitioner's Sixth Amendment right to counsel, the attorney's error cannot constitute cause. That is so because a petitioner's lawyer is "the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Coleman*, 501 U.S. at 753 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990)). Excusing a petitioner's default because of an attorney's negligence "would be contrary to well-settled principles of agency law." *Id.* at 754 (citing RESTATEMENT (SECOND) OF AGENCY §242 (1958)). Thus, when the attorney's error does not violate the Sixth Amendment, it is attributable to the petitioner.

Fourth, the *Coleman* Court concluded that the failure of Coleman's attorney to file a timely appeal of the state-court postconviction judgment was not cause. That was so because even assuming *arguendo* that petitioners have a right to effective assistance of counsel in certain trial-level postconviction proceedings, that hypothetical right would not extend to a "right to counsel to appeal a state collateral determination of [their] claims of trial error." 501 U.S. at 756-57. Accordingly, a petitioner in these circumstances "bears the risk in federal habeas for all attorney errors" of this variety. *Id.* at 754.

Coleman was rightly decided, and Maples is not challenging it here. And because Maples is making no claim of actual innocence, this case is, as the Eleventh Circuit recognized, *Coleman* all over again. Maples failed to appeal the postconviction court's

judgment because of a series of mistakes made by his team of lawyers. The default occurred because De Leeuw and others in New York mistakenly failed to appear in the Alabama proceedings, and mistakenly assumed that the firm's mailroom would forward them any notices the court sent to their departing colleagues. The default also occurred because another member of the team, local counsel John Butler, mistakenly assumed that others would prepare the documents to effectuate the appeal.

Coleman says Maples must bear the risk of these errors, and Maples recognizes that *Coleman* precludes him from arguing that his attorneys' errors were attributable to the State.[2] *See* Blue Br. 36. Yet

---

[2] After Maples filed his opening brief, this Court granted certiorari in *Martinez v. Ryan*, No. 10-1001, to consider a question *Coleman* arguably left open: whether a petitioner has a right to effective assistance in trial-level postconviction proceedings with respect to ineffective-assistance claims when state law precludes him from raising those claims on direct review. The Court's disposition of *Martinez* will not affect this case for at least three reasons. First, this Court's grant of certiorari in *Martinez* is limited to that question, and the petitioner there has not asked this Court to overrule *Coleman*'s holding that in the very least, the petitioner has no "right to counsel to appeal" an adverse trial-court judgment in those proceedings. 501 U.S. at 756-57. That holding governs this case. Second, Maples has not argued, either here or below, that his lawyers' actions in the state postconviction proceedings violated his Sixth Amendment right to counsel. *See* Blue Br. 37; JA 271-79, 283-88. If he had made that argument here or below, it would have been procedurally defaulted because he failed to exhaust any such claim in the state courts. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000). Third, in contrast to the Arizona system at issue in *Martinez*, Alabama law permitted Maples to ask the trial court to appoint a new, state-funded attorney, following trial, to pursue ineffective-assistance claims

despite his lawyers' responsibility for the default, Maples endeavors to get past *Coleman* in two ways. He first tries to go around it, arguing that the court clerk's actions were an external factor that impeded his attorneys' efforts to comply with the deadline. When that fails, he tries to go right through it, arguing the acts of these attorneys were "cause" because, it turns out, they were not his attorneys after all.

As explained below, neither of those theories is tenable. Both fail to account for the fact that at all relevant times, De Leeuw, Butler, and others remained Maples's lawyers. At the end of the day, this is simply a case about a default caused by attorney error. Just as in *Coleman*, due regard for finality and federalism requires the federal courts to uphold the state procedural bar.[3]

II. The clerk's actions do not establish cause to excuse Maples's default.

Maples cannot work an end-run around *Coleman* by way of the clerk's office. The actual receipt of the

---

on direct appeal. *See supra* at 6. Accordingly, even if the Court were to hold that the *Martinez* petitioner had a right to effective assistance in the Arizona proceedings, it will not mean that Maples had a right to effective assistance at any stage of the Alabama postconviction proceedings at issue here.

[3] Although the question on which this Court granted certiorari is limited to the "cause" inquiry, Maples now asks this Court to hold that he has established "prejudice" as well. *See* Blue Br. 22. The Court of Appeals did not pass on this question, Pet. App. 18a n.14, and if this Court does not affirm the judgment below, it should allow the lower courts to resolve that issue in the first instance.

order by Maples's attorney of record means that the clerk fully complied with state law and due process. In any event, Maples has not shown that the clerk's actions impeded the efforts of Butler and De Leeuw to file the appeal on time.

A. Maples waived the clerk argument.

As a threshold matter, Maples waived any argument that the clerk's actions established cause. In his initial district-court filings criticizing the clerk's actions, Maples never cited the Due Process Clause. JA 261-62. When the State later accused Maples of casting blame on the clerk in the Eleventh Circuit, Maples called the State's argument a "straw-man argument" in his reply. JA 286. Then he told the Eleventh Circuit at oral argument that "Maples is not blaming this on the Clerk of the Circuit Court." JA 302. Accordingly, the Eleventh Circuit said nothing about the clerk issue in its opinion. Maples cannot now ask this Court to reverse that court for failing to hold that the clerk was to blame. *See Stewart v. LaGrand*, 526 U.S. 115, 120 (1999) (per curiam).

B. The clerk complied with state and federal law.

In any event, the clerk did more than state or federal law required in this case. He sent the order to the address on file of not just one, but all three of Maples's attorneys of record. One of those attorneys actually received the order. Nothing in state law or the Constitution required the clerk to do more.

1. The clerk's actions satisfied state law.

Maples's assertion that the clerk violated Alabama law is a nonstarter. State courts get the last word on what state law means. *See Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825) (Marshall, C.J.); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). It was thus emphatically the province of the Alabama courts to say whether the clerk complied with Alabama's rules. The Alabama Court of Criminal Appeals found that the clerk had acted in accordance with Alabama law. Pet. App. 235a-236a. The Alabama Supreme Court saw no reason to disturb that decision. *Id.* at 237a. And those conclusions end the state-law analysis.

But as it turns out, those state-law conclusions are also critical to Maples's federal due-process arguments. The lynchpin of Maples's analysis on that front is a fundamental misreading of the Alabama Court of Criminal Appeals' decision in this case. He asserts that "the Alabama courts below found" that Rule 34.4 of the Alabama Rules of Criminal Procedure "required that the clerk provide notice to Maples's *pro bono* attorneys of record as well as local counsel." Blue Br. 23; *accord id.* at 31. That is incorrect. What the Alabama court actually said was that Rule 34.4, which governs "Service and filing," has the same meaning as its federal counterparts: When the defendant is represented by counsel, it simply directs courts to serve "notices" and "documents" on the defendant's attorney *instead of* the defendant himself. Pet. App. 234a (citing ALA. R. CRIM. P. 34.4); *accord* FED. R. CIV. P. 5(b)(1); FED. R. CRIM. P. 49.

Rule 34.5—a provision Maples does not mention—is what governs "Notice of Orders." It simply requires the clerk to "furnish all parties a copy" of orders "by mail or by other appropriate means approved by the judge." ALA. R. CRIM. P. 34.5. The Alabama Court of Criminal Appeals did not read this or any other rule as requiring service on each listed attorney when a party is represented by more than one attorney. Instead, that court expressly held that "'the trial court's notification of [one attorney representing a party] and not [the other attorney representing the same party] concerning certain trial matters was sufficient to give notice to both in light of their apparent co-counsel status.'" Pet. App. 235a-236a (alterations in original) (quoting *Thomas v. Kellett*, 489 So. 2d 554, 555 (Ala. 1986)). That interpretation of the Alabama Rules was consistent with the way the federal courts read analogous Federal Rules. "When a party is represented by more than one attorney, service upon any one of them satisfies the requirements." 4B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1145, at 431, 433 (3d ed. 2002); *accord Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (per curiam); *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990); *Allen v. Pac. Bell*, 212 F. Supp. 2d 1180, 1190 n.2 (C.D. Cal. 2002).

It is thus far from "undisputed that Rule 34.4 required service on Maples's *pro bono* attorneys of record." Blue Br. 31. Maples's mistaken view on this point renders his state-law argument meritless and fatally undermines his argument on the federal question as well.

2. The clerk's actions satisfied due process.

In addition to ruling on the state-law question, the Alabama Court of Criminal Appeals also found that Maples "failed to show that his right to procedural due process was violated." Pet. App. 236a. That adjudication is worthy of deference. Maples had a full and fair opportunity to litigate this issue in the state courts. In light of the fact that state-court adjudications of constitutional issues are entitled to considerable deference even when they go to the *merits* of a petitioner's claim, 28 U.S.C. §2254(d), the equitable considerations underlying the Great Writ counsel deferring to the state court's judgment on a procedural issue such as this one. *See Withrow v. Williams*, 507 U.S. 680, 720 (1993) (Scalia, J., concurring in part and dissenting in part).

But deference or no, the Alabama Court of Criminal Appeals was right about this question. As a general matter, due process does not require courts to serve parties with notice of their orders. The Federal Rules reflect this judgment, *see* FED. R. CRIM. P. 49(c); FED. R. CIV. P. 77(d)(2), and it is longstanding state practice as well. But even if, as the Court of Criminal Appeals determined, the clerk in this case "assumed a duty to notify the parties" that gave rise to a protectable interest under the Due Process Clause, Pet. App. 234a, the clerk's discharge of that duty fully comported with the Fourteenth Amendment. Because Butler got the order, the clerk gave Maples more notice than the Constitution required.

a. The clerk's actions satisfied due process because Butler received the order.

All of Maples's talk about *Jones v. Flowers* is irrelevant in light of what actually happened in this case. Unlike the plaintiff in *Jones*, Maples received notice. *See* 547 U.S. 220, 223-24 (2006). He did so through Butler, his designated counsel of record. The Constitution simply requires notice "reasonably calculated, under all the circumstances, to apprise interested parties" of the action. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). In light of the "common and established practice of providing notification through counsel," *Irwin*, 498 U.S. at 93, the notice to Butler was "charged upon" Maples, *Link*, 370 U.S. at 634. And that ends the due-process inquiry. Actual notice "more than satisfie[s]" any notice obligations the Fourteenth Amendment might impose on the State in these circumstances. *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367, 1378 (2010); *see In re Furlong*, 885 F.2d 815, 818 (CA11 1989); *United States v. Everett*, 700 F.2d 900, 902 n.5 (CA3 1983).

Butler had both actual and apparent authority to receive the order. The Restatement of the Law Governing Lawyers explains that "simply retaining a lawyer confers broad apparent authority on the lawyer unless other facts apparent to the third person show that the lawyer's authority is narrower." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §27 cmt. a (2000). The Restatement also says that "[u]nder the law of agency, a client is bound by the lawyer's act or failure to act when the client has vested the lawyer with apparent authority." *Id.* §27 cmt. b. It is thus unclear why the

Reporter of the Restatement of Agency is maintaining that "the doctrine of apparent authority is generally inconsistent with ordinary understandings of the attorney-client relationship." DeMott Br. 23. This Court has long held that "[w]hen an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed." *Hill v. Mendenhall*, 88 U.S. (21 Wall.) 453, 454 (1874); *accord Kingvision Pay-Per-View, Ltd. v. Ayers*, 886 So. 2d 45, 52 (Ala. 2003).

b. The receipt of the notice by Butler makes Jones v. Flowers *irrelevant here.*

The only question, then, is whether the actual notice to Butler suddenly became not reasonably calculated to give notice to Maples simply because S&C sent the other envelopes back. The answer is no.

On this point, *Jones v. Flowers* is not the controlling precedent Maples makes it out to be. *Jones* does not govern here because it was a case in which *all* the notices came back. Arkansas's Commissioner of State Lands thus had "good reason to suspect when the notice was returned that Jones was no better off than if the notice had never been sent." *Jones*, 547 U.S. at 230 (internal quotation marks omitted). The Morgan County clerk, in contrast, would not have had that suspicion about Maples. As far as he knew, the order had reached Butler—and, as it turns out, it had. This is not a case in which the official simply shrugged his shoulders and "said, 'I tried.'" *Jones*, 547 U.S. at 229. It was a

case in which the official saw that notice had gotten to one attorney of record and said, "It worked."

The returned mail from S&C would not have called that conclusion into question. The returned mail could have signaled any number of things, all of which were more likely than the possibility that notice to Butler had not been notice to Maples. If it meant that Ingen-Housz and Munanka were no longer on the case, then the clerk could have reasonably concluded that Butler would carry on, perhaps with the help of others. If it meant that Ingen-Housz and Munanka had simply "Left Firm," Pet. Reply Add. 8a, then the clerk could have reasonably concluded that Butler knew how to get in touch with them. Either way, the clerk had "heard nothing back indicating that anything had gone awry," and could have been "'reasonably certain'" that the notice had "'inform[ed] those affected.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 315).

The rules simply direct that service be made on an "attorney of record." ALA. R. CRIM. P. 34.4. When a team of attorneys represents a party, a clerk cannot possibly know how that team has allocated responsibility for the case. From the clerk's perspective, all that matters is who counsel of record are, and the law provides that if a party chooses to employ multiple counsel of record, service on any one of them counts as service on the party. *See supra* 2526. Here, the clerk sent the notice to Butler, who was listed as counsel of record. That was all the law required.

That conclusion cannot change simply because a tiny fraction of Alabama's former bar presidents and

appellate judges has asserted that "local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted." Judges Br. 36. If *amici* are suggesting that everyone in the Alabama legal community thinks that local counsel do not even read court orders or confer with national counsel, the State can only respectfully counter that its experience does not bear out that characterization. *See* Brief in Opposition, *Barbour v. Allen*, No. 06-10605, at 8-9 (May 10, 2007) (observing that in addition to out-of-state firms, attorneys from "premier" Alabama law firms have represented capital clients on postconviction review). As Maples's other *amici* have said, the predominant view is that local counsel are "essential to maintaining the integrity of judicial proceedings into which out-of-state counsel wish[] to insert themselves." Ethics Br. 21.

More importantly, *amici*'s unsubstantiated assertions that local counsel "do nothing" can hardly trump what the law says local counsel does. The rules governing admission to the State Bar said Butler would appear on all notices and accept joint and several responsibility to the court. JA 365-66. And four years before the pertinent events in this case, an Alabama Supreme Court opinion declared that "[t]his Court will presume, until it is proven otherwise in the appropriate forum, that an attorney at all times acts in an ethical manner and upholds the oath of the profession." *Ex parte Stephens*, 676 So. 2d 1307, 1315 (Ala. 1996), *overruled in non-pertinent part by Ex parte Henry*, 770 So. 2d 76, 81 (Ala. 2000). If the Alabama Supreme Court could

presume as much, so could the clerk for the Circuit Court of Morgan County. By serving the notice on Butler, the clerk had every reason to believe he was serving it on Maples as well.

There is even less merit to Maples's assertion that the clerk should have done something more because the order said it was cc'ing Ingen-Housz and Munanka. By including those attorneys on the cc: line, the court was not vouching that Ingen-Housz and Munanka "would receive notice of the order." Blue Br. 32. The only thing the cc: line communicated was that the clerk would *send* the order to Ingen-Housz's and Munanka's address of record. The clerk, in fact, did so, and the order in fact arrived at S&C's office in Manhattan. When the order came back from that address but did not come back from Butler, the clerk had every reason to believe that Butler, as co-counsel to Ingen-Housz and Munanka, would have already known that his two colleagues had "Left Firm" and would thus take whatever measures were appropriate. Pet. Reply Add. 7a-8a.

c. Further action by the clerk was not necessary.

Because one of Maples's attorneys of record received the order, *Jones* did not require the clerk to continue taking steps to effect notice. Two more considerations confirm that the Due Process Clause did not require more.

First, *Mullane* speaks of the State's duty to provide notice of the "pendency" of an action—not everything that happens after the parties are made aware of it and have filed their appearances. 339

U.S. at 314. Notice was vital in *Jones* because the State was *instituting* an action to take Jones's property. Orders issued by courts in "situations where the litigation had already begun," on the other hand, are not in the same due-process ballpark. *United States v. $184,505.01 in U.S. Currency*, 72 F.3d 1160, 1164 (CA3 1995) (Alito, J.). Courts are entitled to assume that parties and attorneys will follow their rules, and unlike the *Jones* context—where it may not have been reasonable for the State to presume that non-lawyers will inform officials when they have changed their addresses—courts can legitimately demand that lawyers diligently update their contact information while a particular piece of litigation runs its course. Once a party has received notice of the pendency of an action, the burden falls on the party to keep abreast of developments in the case.

Indeed, there is no indication that due process actually requires a clerk to notify *any* of the attorneys in a case about orders that the court issues after the parties have made their initial appearances. In federal court, the deadline to appeal begins to run even if the district-court clerk fails to send the order to any of a party's attorneys. *See* FED. R. CRIM. P. 49(c); FED. R. CIV. P. 77(d)(2). If the losing party does not discover on his own within a specified time that the court has issued the order, he will be deemed to have waived his appeal. *See Ashby Enters. v. Weitzman, Dym & Assocs.*, 780 F.2d 1043, 1046 (CADC 1985) (Wright, J.); FED. R. APP. P. 4(a)(6). If due process does not require the federal government to inform the parties of an order at all, then it certainly does not require a clerk to track down an

attorney for a party, after an order sent to that attorney's address on file is returned, when one of the other attorneys representing that party actually received the order.

Second, Maples has not pointed to any "additional steps" that would have been "reasonable" for the clerk to take in light of the fact that the notice had made its way to Butler. *Jones*, 547 U.S. at 234. In *Jones*, the State could have perfected notice by simply resending the letter by regular mail. *Id.* The clerk here did not have an option like that. He had already sent the orders to Ingen-Housz and Munanka via regular mail. The S&C mailroom had written "Left Firm" on one of the envelopes, so a phone call to the firm would have been pointless. JA 23. Calling Butler would have made little sense because he had actually received the order. Maples now speculates that if the clerk had sifted through the state-court record, he might have discovered Ingen-Housz's and Munanka's home addresses and phone numbers (from two years before) in their *pro hac* applications. But given that these two associates had "Left Firm," it would not have been obvious to the clerk that those addresses and numbers would still have been good ones. (Maples basically admits that Ingen-Housz's would not have been, given that she "had left the country by that time." Blue Br. 28 n.3.) And contacting Maples directly in prison hardly would have been the first thing to spring to the clerk's mind. It would not even have been *sufficient* because "service upon a party represented by an attorney does not comply" with applicable procedural rules. *See* 4B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1145, at 433 & n.4 (3d ed. 2002);

Fortner v. Balkcom, 380 F.2d 816, 820 (CA5 1967), *abrogated on other grounds*, *Harris v. Nelson*, 394 U.S. 286, 290 n.1 (1969).

At the end of the day, "[w]hat steps are reasonable in response to new information depends on what the new information reveals." *Jones*, 547 U.S. at 234. Because the new information indicated that counsel of record had gotten the order, it would not have been clear to the clerk that any of these additional steps would have been "reasonable" at all.

C. Even if the clerk had erred, his actions would not establish cause.

Maples recognizes that even if he were right about all these notice issues, he still would not have established cause. *See* Blue Br. 34. To seal the deal, Maples would need to show that the clerk's putative constitutional violation also "impeded counsel's efforts" to appeal. *Carrier*, 477 U.S. at 488. But his assertions on that point only confirm two things, and both actually undercut the arguments he is pressing here.

The first is that this case really is just *Coleman II*. The clerk's failure to take these various steps has become an issue only because of the mistakes Butler, De Leeuw, and the others made. If the New York lawyers had simply filed notices of appearance, they would have received the order. If Butler had called S&C when his copy of the order arrived, S&C presumably would have moved forward with the appeal. And if either of those things had happened, no one here would be talking about the Circuit Clerk of Morgan County.

But because Maples's own lawyers' failings caused the problem in the first place, he cannot establish that anything the clerk did *after* the fact was the true "cause" of his default. If the petitioner and his lawyers are not making proper "efforts" to comply with the rules, then there is nothing for an external factor to "impede." The cause-and-prejudice doctrine "define[s] the court's discretion to excuse pleading and procedural requirements for petitioners who *could not comply with them in the exercise of reasonable care and diligence.*" *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (emphasis added). It is thus not a good cause argument to say, "My attorneys missed the deadline because they were negligent, but if somebody else had reminded them about the deadline, they might have straightened up and filed on time." For that reason alone, Maples cannot establish cause here.

Maples's clerk-as-cause argument also belies his attempt to distinguish *Coleman* on the alternative ground that his lawyers abandoned him. Maples says that things would have been different if the clerk had picked up the phone and called Butler, Ingen-Housz (in Belgium, apparently), or Munanka. At that point, Maples says, his lawyers would have saved the day. If it is unclear how Maples can maintain as much while in the next breath claiming that these same lawyers had abandoned him, it is only because, as explained below, these attorneys never abandoned him at all.

III. The acts of Maples's legal team do not establish cause to excuse his default.

With the clerk's office offering no way around *Coleman*'s barrier to habeas review, Maples tries to blast a hole right through it, asserting that despite *Coleman*, "[t]he actions of Maples's attorneys independently establish cause to excuse the procedural default." Blue Br. 35. *Coleman* held that a petitioner must "bear the risk of attorney error" at this stage of postconviction proceedings. 501 U.S. at 752-53. Later, when this Court held that attorney misconduct could give rise to equitable tolling in *Holland v. Florida*, this Court recognized that *Coleman* required a petitioner to bear the risk of attorney error "without qualification." 130 S. Ct. 2549, 2563 (2010). The *Holland* Court distinguished *Coleman* on the basis that it was a case "'about federalism,'" saying that federalism concerns are more significant when it comes to procedural defaults than they are in the equitable-tolling context. *Id.* (quoting *Coleman*, 501 U.S. at 752-53).

If *Coleman* and *Holland* nevertheless leave any space for an argument that the actions of a petitioner's attorneys can establish cause in certain circumstances, it can only be in a case in which, according to the settled principles of agency law referenced in *Coleman*, the lawyer was not acting as the petitioner's "agent." 501 U.S. at 754. The petitioner would thus need in the very least to show *both* (1) that his lawyers had somehow become "'external to the defense'" in light of these agency principles; *and* (2) that those lawyers actually "'impeded'" his efforts "'to comply with the state's

procedural rule.'" *Id.* at 753 (quoting *Carrier*, 477 U.S. at 488).

Maples cannot satisfy this test. Significantly, Maples was not represented by a solo attorney here. He was represented by a team of lawyers. And because De Leeuw and S&C were a part of that team from day one in state court right up through the proceedings in the Eleventh Circuit, Maples's accusations of abandonment and disloyalty have no basis. Maples's team of lawyers never became external to the defense, and nothing external to them impeded their efforts to comply with the deadline.

A. De Leeuw and Butler represented Maples from the outset.

The lawyers who committed the critical mistakes here were never "external" to Maples. From the time Maples filed his state-court petition, De Leeuw and Butler were part of Maples's legal team. At that point, Ingen-Housz and Munanka were part of the team as well. Their departure did not end the relationship between Maples and his other attorneys, and it did not otherwise impede that team of attorneys from complying with the deadline.

1. Maples established an attorney-client relationship with De Leeuw and others before the default.

Although Maples did not argue below that his attorneys were external to him, he now asserts that a remand is needed to determine "to what extent" De Leeuw, Duffy, and the other S&C lawyers who succeeded Ingen-Housz and Munanka "had actually

formed an attorney-client relationship with Maples before the default," Blue Br. 46. No remand would be appropriate in any event, but the record answers all the relevant questions on this front anyway. It shows that De Leeuw and these other S&C lawyers had established an attorney-client relationship with Maples long before the default.

a. Maples established an attorney-client relationship with S&C before the default.

Maples had an attorney-client relationship not just with De Leeuw, but with the firm in which he was a partner. "When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §31 cmt. f. And Maples's pleadings before the District Court confirm that he had retained the entire firm. His amended petition states that "[a]t the time" he filed his state-court petition, he "was represented by Sullivan & Cromwell." JA 256. It also states that "Sullivan & Cromwell represented Mr. Maples *pro bono publico*." JA 256. Although De Leeuw had initially told the state courts that the S&C lawyers had represented Maples "on an individual basis," Pet. App. 257a, he did not make that representation to the District Court or the Court of Appeals. It is those courts' decisions that are under review here, so it is the allegations he made there that control. And for reasons Maples's ethics-scholar *amici* have given, those later allegations were accurate, and De Leeuw's earlier characterization was not. *See* Ethics Br. 10–11.

The petition's allegations, conclusive for present purposes, are important because "[w]hen a lawyer leaves a large firm, . . . it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §31 cmt. f. Accordingly, when Ingen-Housz and Munanka left the firm, Maples's representation remained with S&C.

b. In the very least, Maples established an attorney-client relationship with De Leeuw and others before the default.

Whether or not Sullivan & Cromwell had an attorney-client relationship with Maples, De Leeuw, as an individual lawyer, clearly did. He had been "involved in" the case since the time Maples filed his state-court petition. *See* Pet. App. 257a. After the state court initially denied the State's motion to dismiss, "Mr. De Leeuw and other attorneys at Sullivan & Cromwell continued to prepare for the anticipated evidentiary hearing." JA 228.

De Leeuw assumed lead responsibility for the case once Ingen-Housz and Munanka left for jobs under which they could no longer represent Maples. JA 228, 273, 299; Pet. App. 4a. Three months later, Duffy also joined the effort. JA 231. Maples's original federal habeas petition thus alleged that when Ingen-Housz and Munanka left, "Sullivan & Cromwell attorneys continued in the *pro bono* representation of Mr. Maples." JA 228. Gary Alexion of the Legal Aid Society also worked on the case starting no later than September 2002. Doc 2-Pg 1.

The memorandum Maples signed and submitted to the District Court makes his assent to these arrangements clear. Maples submitted that memorandum in response to a court order requiring him to specify whether he was "fully satisfied with the representation of his habeas counsel." JA 247. His response said, "I want the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers." JA 253. He noted that before the court's order, he "had discussed" his desire to appeal with these lawyers. JA 253. And he said he understood that they did not file his appeal because they "didn't get the decision from the Alabama court in time." JA 253.

It is irrelevant, for these purposes, that De Leeuw, Duffy, and Alexion failed to appear in the Alabama courts before Maples missed his appeal. The mere fact that an attorney is not counsel of record does not mean he or she is not that party's attorney. As long as the client "manifests to a lawyer the person's intent that the lawyer provide legal services" and the lawyer agrees, then the "relationship of client and lawyer arises." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14. And although Maples asserts that the state postconviction trial court made dispositive "findings" that De Leeuw and Duffy did not "represent[] Maples" because they had not filed appearances, Blue Br. 47 n.9, that is not what that court said. It simply noted that De Leeuw and Duffy were not *counsel of record* in the Alabama proceedings at the time. Pet. App. 223a.

For the same reason, it is irrelevant that De Leeuw, Duffy, and Alexion did not get around to

filing motions seeking *pro hac* admission before the default occurred. Section 111 of the Restatement (Second) of Agency does not help Maples on this front, for it does not say that a principal is not responsible for the acts of an agent who "lacks a license necessary to the performance of the relevant tasks." Blue Br. 47. It instead says an agent may *lose* authority to act for the principal based on the "loss of or failure to acquire a qualification by the agent without which it is illegal to do an authorized act." RESTATEMENT (SECOND) OF AGENCY §111. That rule simply terminates an agent's power, on a going-forward basis, if something happens that makes it *impossible* for him to act legally—if, to use the example from the Restatement, he is "disbarred" from the practice of law altogether, *id.* illus. 1, or he applies for admission to the bar and is denied. That is not what happened here. The Alabama court never denied De Leeuw and the others admission *pro hac*. Indeed, the state and federal courts in Alabama admitted De Leeuw when he sought the out-of-time appeal and filed the federal habeas petition. JA 238, 7. His failure to seek admission earlier was not an event that retroactively nullified his and Maples's entire attorney-client relationship. It was simply one of the mistakes that caused his client's default.

2. Maples established an attorney-client relationship with Butler before the default.

From the beginning of the state postconviction proceedings, Butler was also part of Maples's legal team. Maples acknowledges that Rule VII of the Rules Governing Admission to the Alabama State Bar gave Butler "joint and several responsibility" for

his case. JA 366. So just by signing Butler up, Maples necessarily authorized him to accept service of court orders on his behalf. In suggesting otherwise, Maples is trying to have it both ways. Unless he wants to concede that every pleading he filed in the state postconviction court was a nullity—in which case he has bigger procedural-bar problems than anyone here has previously realized—then he must acknowledge that Butler acted as his lawyer when he allowed his name, as Rule VII required, to "appear on all notices, orders, pleadings, and other documents filed in the cause." JA 365-66.

Although Butler did not plan to lead the charge as the case moved forward, the record does not show that he refused to accept his "responsibility" under Rule VII. Blue Br. 48. Butler told the courts he had not had "substantive involvement" in the case, Pet. App. 255a, but that does not mean he did not accept "joint and several responsibility" in the sense that if something went wrong, he would be held responsible. The words "substantive involvement" can mean any number of things. A senior partner whose name appears at the top of a brief may not have had "substantive involvement" in the sense that she did not do the drafting—or even, sometimes, the editing. But that does not mean she is not an attorney for the client whose name appears on the front cover. A "client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §19. A team of lawyers can therefore divide up responsibility for a case, with some playing more significant roles than others.

Here, although Butler's role on the team did not involve drafting or other substantive work, the record shows that he thought, quite reasonably, that he was Maples's attorney. *See* RESTATEMENT (THIRD) OF AGENCY §2.01 (2006) (agent's actual authority turns on agent's reasonable belief that the principal wishes the agent to act). Butler said he did nothing with the order not because he did not represent Maples, but because he "assum[ed]" that other members of the team would do what needed to be done. JA 257-58. And after Maples missed his appeal, Butler filed papers for his client in five different courts, including this one, signing at least two of them. JA 229, 230, 236, 238, 242. Courts look to the "totality of the circumstances" to determine whether an agency relationship exists. *E.g., People v. Pilkington*, 156 P.3d 477, 480 (Colo. 2007); *State v. Wall*, 910 A.2d 1253, 1258 (N.H. 2006); *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 878 A.2d 567, 583 (Md. 2005). These circumstances serve as compelling evidence that neither Butler, nor Maples, nor anyone else on the team thought Butler had not established an agency relationship with Maples at the outset of this case.

The record does not support the theory, pressed by Maples and his *amici* for the first time in this forum, that Butler was merely "a *sub*-agent of Ingen-Housz and Munanka" and that he therefore became "external" to Maples when those lawyers left. Blue Br. 49-50; *accord* DeMott Br. 16-17. That theory relies on the false premise, disclaimed by Maples below and debunked by the ethics scholars here, that "when Maples engaged Ingen-Housz and Munanka as his agents, he engaged *only* them, and not their

law firm or any other individuals in the firm." DeMott Br. 19. Perhaps because that premise is wrong, Maples made no allegation below that Ingen-Housz and Munanka simply enlisted Butler's help as a sub-agent. JA 226, 255, 271. Indeed, the Rules Governing Admission to the Alabama State Bar definitively made Butler more than that. Rule VII's provision giving Butler "joint and several responsibility" meant, if nothing else, that if for some reason national counsel withdrew, Butler would remain counsel of record, responsible to the court and the client. JA 365-66. In any event, the fact that Butler remained on the case with Maples's blessing after Ingen-Housz and Munanka left shows that he was not simply the sub-agent for those two associates.

B. Because the team's attorney-client relationship with Maples did not terminate before the default, their actions did not establish cause.

Thus, immediately after Ingen-Housz and Munanka departed, Maples had a team in place, consisting of Butler and De Leeuw at least. Soon thereafter, De Leeuw's associate Felice Duffy, and Gary Alexion from Legal Aid, joined their ranks. The only question remaining, then, is whether something happened, between then and the day the appeal deadline passed, that severed the agency relationship between Maples and those lawyers, thus rendering them "external to the defense."

The answer is no. Maples has offered two theories on this front. First, drawing from the Restatement of Agency, he claims that his lawyers breached the duty

of loyalty and thereby severed their relationship. Second, drawing from language in this Court's decision in *Holland*, he asserts that his lawyers abandoned him and thereby became "external to the defense." As explained below, neither of those theories is plausible in light of what actually happened in this case.

1. Ingen-Housz and Munanka's departures are irrelevant to the cause question.

One threshold point needs to be made at the outset. Much of Maples's analysis is devoted to allegations that Ingen-Housz and Munanka were disloyal and abandoned him. But the fact that De Leeuw had been working on the case and then took responsibility for it upon their departure takes all the air out of those tires. These two young associates did not breach their duty of loyalty or abandon their client. They simply left their law firm. When they departed, each had a duty to "take steps to the extent reasonably practicable to protect the client's interests," including "allowing time for employment of other counsel." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §33(1). And each discharged that duty in full. It is not as if they were sole practitioners who resigned on the eve of trial and left their client without representation of any sort. Instead, they handed off responsibility for the case to another firm lawyer—a partner, no less—who had already been working on the case. Nothing about their departure itself was disloyal or a *de facto* abandonment, and it certainly did not "impede" the other members of the team from representing Maples effectively on a going-forward basis.

Granted, Ingen-Housz and Munanka did do one thing wrong when they left: They failed to file motions to withdraw from Maples's case. But that is a non-issue for two reasons.

First, this failing was not "external" to Maples's team. The right time for these associates to have withdrawn would have been before they left the firm. The record does not make clear whether it was a coincidence that neither withdrew, or whether they instead were following instructions from S&C to hold off until others at the firm had appeared. Either way, De Leeuw and S&C bear responsibility for the matter. As the ethics-scholar *amici* observe, De Leeuw and his partners had a duty to supervise their associates. *See* Ethics Br. 10-12 & n.10 (citing ALA. R. PROF. CONDUCT 5.1(a); N.Y. CODE PROF'L RESPONSIBILITY DR 1-104, 22 N.Y.C.R.R. §1200.5 (2002)). In so doing, they should have ensured that Ingen-Housz and Munanka filed all appropriate documents with the court before they left.

Second and just as important, the associates' failure to withdraw did not impede the team from representing Maples in the future. Nothing prevented De Leeuw and the others in New York from appearing in the litigation on Maples's behalf. That fact distinguishes two lower-court decisions that Maples cites for the proposition that "cause" exists "where [an] attorney of record ceased representation but 'had not taken any formal steps to withdraw,' precipitating default.'" Blue Br. 45 (citing *Porter v. State*, 2 S.W.3d 73 (Ark. 1999); *Nara v. Frank*, 264 F.3d 310 (CA3 2001)). Neither of those cases involved the cause-and-prejudice doctrine, and neither involved circumstances like those here, in

which the petitioner was represented by a team of lawyers, at least one of whom maintained responsibility for the matter after the others had departed.

Maples's accusations about Ingen-Housz and Munanka are thus a smokescreen. The real question is whether the remaining members of the team became "external factors" that impeded Maples's ability to appeal.

2. The team's attorney-client relationship did not terminate based on any breach of the duty of loyalty.

Maples has no valid claim that the remaining members of his team breached their duty of loyalty and thereby became external to him. An agent breaches that duty if and only if he "prefers his own or another's interests" to those of the principal. RESTATEMENT (SECOND) OF AGENCY §112 & cmt. b. The Restatement says an agent breaches the duty if he "acquires adverse interests," and every example the Restatement uses to describe the duty involves an agent's acquisition of some sort of conflict-of-interest. *See id.* illus. 1–3. Decisions Maples cites on this point also discuss the duty in these conflict-of-interest terms. *See Baldayaque v. United States*, 338 F.3d 145, 154 (CA2 2003) (Jacobs, J., concurring) (petitioner's lawyer "undertook a futile, unresearched, and frivolous initiative for the sole purpose of keeping" a $5000 retainer); *Manning v. Foster*, 224 F.3d 1129, 1134-35 (CA9 2000) (default can be excused when petitioner's lawyer has "conflict of interest"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (CA8 1992) (default can be excused when the

"alleged conflict" is "inimical to [the client's] interests"); *United States v. Galindo*, 871 F.2d 99, 101 (CA9 1989) ("When an agent acts contrary to the interests of the principal, the agency relationship ceases."); *State v. DiGiulio*, 835 P.2d 488, 492 (Ariz. Ct. App. 1992) ("Violating the duty of loyalty, or failing to disclose adverse interests, voids the agency relationship."). Maples has not alleged that his lawyers had a conflict-of-interest that caused them to miss the deadline.

Nor does Maples have a compelling argument that his lawyers breached their duty of loyalty by failing to act diligently on his case. For one thing, a mere lack of diligence does not violate the duty of loyalty. "[T]he fact that an action taken by an agent has unfavorable results for the principal does not establish that the agent acted adversely" for duty-of-loyalty purposes. RESTATEMENT (THIRD) OF AGENCY §5.04 cmt. c. The canons of professional responsibility draw a distinction between diligence, on the one hand, and loyalty, on the other. *Compare* ABA MODEL RULES PROF'L CONDUCT R. 1.3 (imposing a duty of diligence), *with* ABA MODEL RULES PROF'L CONDUCT R. 1.7 & cmt. (discussing concepts of "loyalty" with respect to conflict-of-interest rules). *See generally* REUSCHLEIN & GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §68, at 127-28 (2d ed. 1990) (saying nothing about diligence-related issues in conjunction with their duty-of-loyalty discussion).

More importantly for present purposes, even if the duty of loyalty encompassed some minimal level of diligence, Maples cannot show that his lawyers failed to meet it. On this front, Maples cherry-picks a single member of his team—Butler—arguing that

because the only function he had served was to move for Ingen-Housz's and Munanka's admission, he was disloyal. But Butler's level of participation in the case—which would not have impeded the New York lawyers' efforts in any event—was no violation of the duty of loyalty. The 1914 treatise Maples cites on this front simply says that when an agent serves more than one principal, he must offer "a fair and reasonable devotion to the business of the principal." 1 MECHEM, A TREATISE ON THE LAW OF AGENCY §1232, at 903 (2d ed. 1914). That treatise further notes that the appropriate amount of time for these purposes "depend[s] upon the circumstances of the case." *Id.* In light of the circumstances of this case—with Maples's lawyers having divvied up responsibility amongst themselves—nothing suggests that Maples or anyone on the team thought Butler had devoted less time to the matter than was fair and reasonable. Butler was supposed to play a limited role, while S&C's lawyers pulled the substantive oars. And they did so, "prepar[ing] for the anticipated evidentiary hearing" and "periodically me[eting] with" Maples. JA 228, 257.

It would have been one thing if Maples had alleged that his lawyers had missed the deadline because they were trying to "deliberately deceive[] him." *See Holland*, 130 S. Ct. at 2573 (Scalia, J., dissenting). If that had happened, Maples could have argued that his lawyers had breached their duty of loyalty, become external to him, and—by virtue of any intentional misrepresentations they might have made about their representation—impeded his ability to appeal. But because Maples made no such

allegation, the duty of loyalty is not a viable path to establish that his lawyers' actions were cause.

3. The team's agency relationship was not terminated by "abandonment."

Nor can Maples establish cause based on the theory that his lawyers "abandoned" him. The "abandonment" concept has not previously appeared in this Court's cause-and-prejudice jurisprudence. Nor do the Restatements use the term as an example of an act that can end an agency relationship. *See* RESTATEMENT (SECOND) OF AGENCY §§105-24; RESTATEMENT (THIRD) OF AGENCY §§3.06-3.11; *cf. Panzino v. City of Phoenix*, 999 P.2d 198, 201-03 (Ariz. 2000) (holding that an agent's "abandonment" of a principal does not affect his ability to bind principal to a third party, absent notice to the third party). Maples has drawn the term from this Court's decision in *Holland*, which addressed the circumstances under which the federal statute of limitations could be tolled in habeas cases. Even there, the term originated not in any precedent, but rather in a letter the petitioner wrote to the state courts, asserting that his lawyer had "abandoned" him and asking those courts to allow him to proceed *pro se*. 130 S. Ct. at 2555.

Whatever force the concept of abandonment might have in the cause-and-prejudice doctrine, it has no application to the particular facts of this case. Maples has relied heavily on the concurrence in *Holland*, in which Justice Alito found that the petitioner had alleged facts that, if true, would establish "extraordinary circumstances" warranting equitable tolling. 130 S. Ct. at 2565-66 (Alito, J.,

concurring in part and concurring in the judgment). The *Holland* Court premised its analysis on the notion that equitable-tolling doctrine could be more flexible than cause-and-prejudice doctrine, where federalism concerns are heightened. *Id.* at 2563 (majority opinion). But even if the same analysis applies in this context, Maples cannot establish cause. Nothing in Justice Alito's concurrence—or, for that matter, in the *Holland* majority—indicates that attorney "abandonment," standing alone, could justify equitable tolling. And nothing in either opinion indicates that what happened here amounted to "abandonment" for present purposes.

In finding that the petitioner there had alleged facts establishing "extraordinary circumstances," Justice Alito did not simply rely on the petitioner's assertion that his lawyer had "abandoned" him. He relied on the lawyer's "near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2555-59 (majority opinion) (documenting the petitioner's unanswered letters). Also relevant were the petitioner's "reasonable efforts to terminate counsel due to his inadequate representation." *Id.* at 2568 (Alito, J., concurring in part and concurring in the judgment). Moreover, he specifically asked the state court to allow him to "proceed *pro se*" so he could file his federal petition on time. *Id.* Critically, these efforts had been "successfully opposed by the State," which had convinced the court to force the petitioner to stick with the nonresponsive lawyer. *Id.* On those

grounds, Justice Alito concluded that the petitioner's attorney was "not operating as his agent in any meaningful sense of that word." *Id.*

This case looks nothing like *Holland*. Although Butler did not "deal with substantive issues," Pet. App. 255a, the team as a whole was "prepar[ing] for the anticipated evidentiary hearing," JA 228. They were "periodically me[eting] with" Maples. JA 257. *Cf.* RESTATEMENT (SECOND) OF AGENCY §118 (allowing an agent to renounce his authority). It is thus no surprise that, unlike Holland, Maples himself made no attempt to terminate counsel or do anything else that would have ended the agency relationship. *Cf. id.* (allowing a principal to revoke an agent's authority). Nor was he forced, by the State or anyone else, to keep these lawyers. To the contrary, when given a chance to cast them aside even *after* the default, he told the District Court he "want[ed] the lawyers at Sullivan and Cromwell and the other law firms to continue to be my lawyers because I feel that they will do everything they can for me." JA 253. These lawyers by no means willfully ignored their client's directives. They simply made mistakes about how to ensure that they would receive notice of court action, and about who was going to take responsibility for the appeal. After they made these mistakes and the default occurred, each of these lawyers, by vigorously seeking relief for their client in state and federal court, proved that they never abandoned him. *See supra* at 11-14.

The mere fact that they made these mistakes, and thereby failed to serve their client at the critical juncture in this case, did not transform these lawyers into temporary abandoners. What happened

in this case is functionally indistinguishable from what happens most any time a lawyer misses a deadline. The lawyer in *Irwin v. Department of Veterans Affairs* did not do his job during the 30-day window for filing his client's complaint, but the Court properly called that failing "at best a garden variety claim of excusable neglect." 498 U.S. at 96. The lawyer in *Link v. Wabash Railroad Co.* did not even show up during a pretrial hearing, but the client was appropriately "deemed bound by" the lawyer's no-show. 370 U.S. at 634. The lawyer in *Coleman* failed in his responsibilities during the 30 days he had to file his client's notice of appeal, but this Court properly found that the petitioner had to "'bear the risk of attorney error.'" 501 U.S. at 753 (quoting *Carrier*, 477 U.S. at 488). These are not acts of abandonment in any meaningful sense of that word, and neither were the mistakes Maples's team committed here. To hold otherwise would invite a host of habeas filings "cloak[ing]," as the Fifth Circuit has put it, contentions "of poor representation . . . in the mantle of no representation." *Fairman v. Anderson*, 188 F.3d 635, 643 (CA5 1999).

This case is thus not *Holland*. When Ingen-Housz and Munanka departed S&C, they left Maples with a team of lawyers that, with his consent, acted as his agents going forward. Those lawyers did not abandon him, and they did not breach their duty of loyalty to him. They simply made mistakes, and that makes this case *Coleman*.

* * *

On the face of it, it is hard not to feel a little sorry for a petitioner like Keith Coleman or Cory Maples, who loses his chance to assert claims in federal court because of his lawyers' errors. But as this Court explained in *Coleman*, other equitable considerations take precedence in circumstances like these. Over 15 years ago, Maples killed two people, and he does not deny it now. He received a full determination of the merits of the claims at issue here in a state-court adjudication that Congress has deemed worthy of deference. *See* 28 U.S.C. §2254(d). He also obtained federal review of other claims that he had preserved on direct review, and the District Court and Court of Appeals found that those claims were without merit. Neither of the theories through which he is now seeking to excuse his default finds support in the facts or in this Court's precedents. *Coleman* found that no sustainable system of federal habeas review could excuse defaults in circumstances like these, and *Coleman* was right.

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General
*Counsel of Record

William G. Parker, Jr.
Assistant Attorney General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

Nicholas Q. Rosenkranz
Deputy Attorney General

600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-4026

June 30, 2011

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 1 - 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE STATE'S OWN CONDUCT ESTABLISHES CAUSE 4

A. The State Interfered With Maples's Ability To Comply With The Default Rule 4

B. The Notice Failure Violated Due Process 6

C. There Was No Waiver 10

II. THE CONDUCT OF POST-CONVICTION COUNSEL ESTABLISHES CAUSE 10

A. *Coleman* Is By No Means Controlling 10

B. Maples Was Abandoned By Counsel 13

C. At A Minimum, The Court Should Remand .. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates,
780 F.2d 1043 (D.C. Cir. 1986) 8

Babich v. Clower,
528 F.2d 293 (4th Cir. 1975) 5

Coleman v. Thompson,
501 U.S. 722 (1991) 1, 3, 11, 13

Evitts v. Lucey,
469 U.S. 387 (1985) 7

Holland v. Florida,
130 S. Ct. 2549 (2010) 11, 12, 13, 19

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 6

Jones v. Flowers,
547 U.S. 220 (2006) 8

Lankford v. Idaho,
500 U.S. 110 (1991) 7

Link v. Wabash Railroad Co.,
370 U.S. 626 (1962) 6, 8

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 7, 8

TABLE OF AUTHORITIES—Continued

Page(s)

Murray v. Giarratano,
492 U.S. 1 (1989) 20

Presley v. State,
978 So. 2d 63 (Ala. Crim. App. 2005) 8

Skinner v. Switzer,
131 S. Ct. 1289 (2011) 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 20

STATUTES AND RULES

28 U.S.C. § 2254(d) 9

Alabama Rule of Criminal Procedure 6.2(c) 18

Alabama Rule of Criminal Procedure 34.4 9

Alabama Rule of Criminal Procedure 34.5 9

Federal Rule of Appellate Procedure 4(a)(5) 8

Federal Rule of Appellate Procedure 4(b)(4) 8

Federal Rule of Civil Procedure 77(d)(1) 8

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

New York City Bar Association Pro Bono & Legal Service Committee, *International Pro Bono Representations: Tips for Volunteer Lawyers* (2007) 16

Restatement (Second) of Agency (1958) 11, 15

Restatement (Third) of The Law Governing Lawyers (2000) 16, 17

INTRODUCTION

The name that matters in this case is Cory Maples. He is set to be executed without any federal habeas review of serious constitutional claims because of a missed deadline stemming from external factors wholly beyond his control, including the State's own actions. The State acknowledges (at 55) that the default is attributable to the actions of others (not Maples), and makes no apologies for the indigent-capital-defendant-representation system that produced this result. Instead, the State grounds its case on several astounding propositions. For example, the State argues (at 27)—for the first time in this case—that a court clerk has *no* duty to notify an inmate of a dispositive post-conviction order in a capital case. The State argues (at 37) that federal courts lack the authority to excuse a procedural default when it stems from counsel's outright abandonment of an inmate. The State suggests (at 30) that, instead of undermining public confidence in the administration of capital punishment, the system actually "'worked'" in this case. And the State claims (at 2) that, instead of providing a safety-valve, "the principles underlying the Great Writ" require the federal courts to close their doors on a death-row inmate in these circumstances.

No precedent of this Court compels that unsettling result. And that includes *Coleman v. Thompson*, 501 U.S. 722 (1991)—the decision on which the State pins its case. Unlike *Coleman*, the default here is attributable to the State itself, which not only created an indigent-capital-defendant-representation system that places inordinate weight on the role of out-of-state counsel, but inexplicably did nothing when notice to Maples's out-of-state counsel was returned unclaimed

with "Left Firm" written on an envelope. Moreover, unlike *Coleman*, this case does not involve the kind of "[a]ttorney ignorance or inadvertence" that is customarily attributed to a client under agency principles. To the contrary, as the Reporter for the Restatement (Third) of Agency has explained, the attorney conduct at issue here—outright abandonment—is *not* attributable to the client under agency principles. DeMott Br. 10-22. Alabama, in other words, is not asking the Court to apply *Coleman*; it is asking for a fundamental expansion of *Coleman*.

Instead of extending *Coleman*, the Court should adhere to its precedents recognizing that cause exists when a default is attributable to external factors beyond an inmate's control. This case ought to be a textbook example for that. Alabama's notice failure—which the state amici tellingly do not try to defend—directly impeded Maples's ability to comply with the default rule. And the same goes for the actions of Maples's post-conviction counsel, who abandoned Maples at the critical juncture. The State tries to rewrite the events underlying the abandonment. But to be clear, Maples—who was confined to a cell on death-row—did not know that his *pro bono* attorneys of record had left their law firm and that he had been abandoned by counsel until the State notified him of the default. Regardless of whether the focus is on the actions of the State, post-conviction counsel, or both, the default simply is not attributable to Maples himself.

In the end, the State's position is that "federalism and finality" (at 15) trump all other considerations, even the equitable principles on which the writ of habeas corpus is grounded, and even the most basic sense of fairness and dignity in a capital case in which

the inmate has serious claims. That position is out of step not only with this Court's precedents, but with a tradition going back to Blackstone. Pet. Br. 18.[1]

ARGUMENT

The State does not seriously contest the key legal principle governing this case: cause exists to excuse a default when the default was the product of "something *external* to the petitioner, something that cannot be fairly attributed to him." *Coleman*, 501 U.S. at 753; *see* Pet. Br. 19-20. That settled rule follows "clearly" (*Coleman*, 501 U.S. at 753) from this Court's precedents and is compelled by the equitable nature of the writ of habeas corpus, Pet. Br. 18. In common-sense terms, it is difficult to conceive how the default at issue here could be "fairly attributed" to Maples given the extraordinary external events precipitating the default. The State nevertheless insists (at 55) that Maples should "lose[] his chance to assert claims in federal court." That argument should be rejected.

---

[1] Alabama tries (at 3-6) to gloss over the atrocious representation that Maples received at trial and sentencing, even suggesting that defense counsel's "stumbling around in the dark" remark was just a "joke" (at 5). It was not to Maples. And while Maples does not have to show that he will prevail on his ineffective-assistance-of-counsel claim to win the right to *present* it to a federal court, that claim is compelling. Pet. App. 30a-31a & n.3 (dissent); Ala. Appellate Court Justices Br. 20-28; Const'n Project Br. 20-22. Indeed, the State does not even attempt to defend counsels' profession of guilt during closing. Pet. Br. 8.

I. THE STATE'S OWN CONDUCT ESTABLISHES CAUSE

A. The State Interfered With Maples's Ability To Comply With The Default Rule

The State acknowledges (at 20) that "'interference by officials'" with a petitioner's ability to comply with a default rule is a "paradigmatic example" of cause. But the State argues that it did not interfere with Maples's ability to meet the deadline for appeal because Butler—the local counsel whose "sole" (JA 228-29) role was to facilitate the admission of Maples's *pro bono* attorneys of record—received a copy of the Rule 32 order. *See* Ala. Br. 16, 24, 28, 30, 32. For two overriding reasons, that argument is unavailing.

First, the State established an indigent-capital-defendant-representation system in which it was highly unlikely that local counsel would convey notice in this situation. As the State has touted to this Court, Alabama's system relies heavily on out-of-state volunteer counsel. Pet. Br. 30. Before 2006, the State required such counsel to "associate" a local counsel in the matter. JA 365-66; *see* Pet. Br. 5. But it was well-known that (as indisputably happened here, Ala. Br. 11) local counsel "most often do nothing other than provide the mechanism for foreign attorneys to be admitted." Ala. Appellate Court Justices Br. 36; *see* ACDL Br. 8 (such a role was "commonplace").[2]

---

[2] That fact presumably explains why the State did not even bother to serve Butler with a copy of its Rule 32 response, JA 26, or try to contact him after the default, Pet. App. 253a. The State's only response is to say (at 31) that some "Alabama law firms" have represented death-row inmates in Alabama. But it is referring to situations where Alabama firms acted as *lead* counsel, not local

Remarkably, instead of decrying that conduct, the State *defends* it as simply a way in which lawyers may "divide up responsibility for a case." Ala. Br. 43; *see id.* at 17, 50. But by establishing that system and then doing nothing when it learned that Maples's out-of-state attorneys lacked notice of the Rule 32 order, the State interfered with Maples's ability to appeal.

Second, the State's own actions greatly increased the likelihood that local counsel would do nothing here. The Rule 32 order stated that *all* counsel of record would be served (by way of a "cc," JA 225). Where (as here) out-of-state lawyers have assumed responsibility for a matter and local counsel's role is subsidiary or non-existent, such an order can only create confusion among counsel when notice is not received by out-of-state counsel—and local counsel does not know that. The State itself argues (at 17, 43, 50) that counsel may divvy up responsibilities in this fashion, yet it fails to account for the confusion that inevitably may ensue. As Maples has explained (at 32), in analogous though less dire circumstances, courts have held that a missed deadline is attributable to confusion created by the State itself, even though local counsel received notice. *See, e.g.*, *Babich v. Clower*, 528 F.2d 293, 295 & n.2 (4th Cir. 1975); Const'n Project Br. 10-11. Alabama does not mention, much less address, *Babich*. And the State is even more responsible for the default here because,

---

counsel. As noted, Alabama eliminated the local-counsel requirement for post-conviction actions in 2006, effectively acknowledging that the rule had undermined the representation provided to indigent criminal defendants. Pet. Br. 5, 31 n.4.

unlike in *Babich*, the court clerk *knew* that out-of-state counsel did not receive notice—yet did nothing.[3]

Against all of this, the State's response seems to be that Butler got the order, so "no harm, no foul." But even assuming that service on "any one" counsel would be sufficient in the typical circumstances, Ala. Br. 15, it was not sufficient given the practicalities here. And regardless of the fact that Butler received the order, the State's actions impeded the receipt of notice *by Maples*, and thus impeded his ability to appeal. There was, in other words, both a foul *and* a harm.[4]

B. The Notice Failure Violated Due Process

The State's response on notice is also built around the far-reaching proposition that Alabama had no constitutional obligation to provide Maples *any* notice of the Rule 32 order. Ala. Br. 27; *see id.* at 32-34. The Court need not resolve that issue because it is undisputed that the State's own interference with an inmate's ability to meet a default rule establishes cause

---

[3] Contrary to the State's suggestion (at 36), the fact that Butler had abandoned Maples by the time of the default does not mean that he would have taken no action to prevent the default if he had learned that Maples's *pro bono* attorneys of record had left Maples without *any* functioning attorney of record in his Rule 32 proceeding. Maples does not have to show that his attorneys were "cold-hearted[]" (Ala. Br. 1) to establish that he was abandoned.

[4] Butler's receipt of notice is irrelevant for another reason. Because he was not serving as Maples's agent in any meaningful sense (or was at most a sub-agent whose authority had expired, Pet. Br. 50), that notice cannot be "'charged upon'" Maples. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *see* Pet. Br. 40-41, 49; DeMott Br. 15-19. For this reason, as well as the different context here, the State's reliance on *Link* and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is fundamentally misplaced.

(regardless of whether the Constitution is violated). *See id.* at 20. But in any event, the State is wrong.

Maples had a due-process interest in receiving adequate notice of the Rule 32 order. A post-conviction action concerns the validity of a conviction and sentence and thus a liberty interest. And in a capital case such as this, a life interest is implicated as well. Moreover, although States are not required to establish mechanisms for post-conviction relief, when they do (as all States have, including Alabama) the procedures must comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1302 (2011) (Thomas, J., joined by Kennedy & Alito, JJ., dissenting). And "the need for notice" is especially pronounced "[i]n the capital context, in which the threatened loss is so severe." *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991).

The State argues (at 32) that due-process notice protections apply only to the *initiation* of an action. But this Court has not cut-off due process in that extreme fashion. In *Lankford*, for example, the Court held that due process entitles a defendant to adequate notice at a sentencing hearing—which (much like an appeal) represents a new phase of an already commenced action. While the scope of the notice required varies with the circumstances, Pet. Br. 25, the issuance of a dispositive post-conviction order that can affect an inmate's ability to challenge the constitutionality of his conviction and death sentence in federal court warrants notice that is—at least—"reasonably calculated" to reach the inmate. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Indeed, the Alabama courts themselves have recognized that an inmate has a due-process right

to notice of Rule 32 orders. *See, e.g., Presley v. State*, 978 So. 2d 63, 66-68 (Ala. Crim. App. 2005).[5]

Mullane establishes that "when notice is a person's due, process which is a mere gesture is not due process"; instead, the process must be that of "one desirous of actually informing the [intended recipient]." 339 U.S. at 315. *Jones v. Flowers*, 547 U.S. 220, 229 (2006), recognizes that someone who actually wants to provide notice would do *something* when a notice is returned unopened and unclaimed. The State suggests (at 30) that, since only *two* of the three notices were returned here, it was reasonable for the clerk to sit back and say, "It worked" (when the clerk did not know whether the third letter was received). That response defies credibility, is incompatible with the reasoning of *Jones*, and fails to account for the fact that the two returned notices were to out-of-state counsel, who (as the clerk should have known) play a critical role under Alabama's post-conviction representation system. *Supra* at 4-5. And saying that the system "worked" in this case denigrates the invaluable role played by clerks in the administration of justice across America.

---

[5] Alabama erroneously suggests (at 27, 33) that recognizing a due-process interest in receiving reasonably calculated notice of a dispositive post-conviction order in a capital case would cast doubt on the constitutionality of federal rules of procedure. The rules it cites require courts to serve notice "[i]mmediately after entering an order or judgment." Fed. R. Civ. P. 77(d)(1). More important, the rules are subject to safety valves that allow courts to extend the time to file for "excusable neglect or good cause." Fed. R. App. P. 4(b)(4), 4(a)(5); *see also Link*, 370 U.S. at 632 (noting protections); *Ashby Enters., Ltd. v. Weitzman, Dym & Assocs.*, 780 F.2d 1043, 1046 (D.C. Cir. 1986) (Wright, J.) (same).

The State incredibly suggests (at 34) that no "'additional steps'" were reasonable in this case. But the State does not deny that the clerk had Ingen-Housz and Munanka's personal contact information. Pet. Br. 28. The State itself promptly reached out to Maples in prison *after* the default. Pet. App. 253a. And calling Butler would have made perfect—not "little," Ala. Br. 34—sense, since the clerk did not know that Butler had received the order and it was well-known in any event that local counsel usually did nothing in Rule 32 cases after facilitating the admission of out-of-state counsel (creating a grave risk that Butler would just ignore the order). One thing is clear: if the clerk *had* picked up the phone or put the order in the mail to Maples, the default almost certainly would have been avoided.[6]

Anyone who cared an iota about whether Maples in fact received notice would have followed up. And no matter what standard of due process applies in this situation, the State's conduct flunks the test.[7]

---

[6] Contrary to Alabama's contention (at 25-26), Maples's position is that the clerk *followed*—not violated—state law by sending notices to Maples's attorneys of record. As Alabama has itself stated (Opp. 32), Rule 34.4 "required" service on "all three of Maples' attorneys of record." *See* Pet. Br. 23. That is what the Alabama Rule 32 court said. Pet. App. 224a, 234a. And it is, in all events, what the Rule 32 order directed. JA 225. The State has waived its argument (at 26) based on Rule 34.5. But in any event, Rule 34.5 does not supersede the service requirement in Rule 34.4.

[7] The State briefly suggests (at 27) that the state court's ruling on whether to excuse the default is entitled to deference under 28 U.S.C. § 2254(d). But § 2254(d) by its terms applies only to a "*claim* that was adjudicated on the merits," and thus not a motion for leave to file an out-of-time appeal. (Emphasis added.)

C. There Was No Waiver

The State's suggestion of waiver (at 24) fails for the same reasons it did at the certiorari stage. Maples indisputably briefed this argument below. Cert. Reply 8-9; Cert. Reply Add. 2a-6a; *see also* JA 266-67. The State claims (at 24) that Maples's counsel below *relinquished* the argument at oral argument before the Eleventh Circuit. Not so. In the passage on which the State relies, counsel stated that Maples did not "blam[e]" the clerk for the fact that the letters were "sent ... back" by the New York mail room. JA 302. Counsel in no way relinquished the different argument (briefed by Maples) that the clerk's failure to do anything once he received the unclaimed letters in the return mail established cause. That conclusion is underscored by the fact that, when he affirmatively raised "cause and prejudice" during the argument, counsel specifically invoked (JA 327) two Eleventh Circuit cases cited in Maples's brief for the proposition that "[c]ause exists when a court fails to properly deliver the required documents so that a petitioner may timely effect an appeal." JA 275 (citing cases).

II. THE CONDUCT OF POST-CONVICTION COUNSEL ESTABLISHES CAUSE

Alabama does not deny that Maples's attorneys impeded Maples's ability to comply with the default rule. *See* Ala. Br. 36. Instead, the State argues (at 1-2, 15, 18-23, 37) that *Coleman* categorically cuts off any inquiry into cause based on attorney conduct, even as to abandonment. That argument is unavailing.

A. *Coleman* Is By No Means Controlling

No matter how many times the State says (at 1) that *Coleman* "controls this case," the State cannot

make it so. *See id.* at 15 ("This case is indistinguishable from *Coleman.*"); *id.* at 18 ("exactly like *Coleman*"); *id.* ("virtual replay"); *id.* at 21 ("*Coleman* all over again"). *Coleman* differs in crucial respects—even apart from the fact that the default there was not attributable to the State's own conduct. Coleman's attorneys were functioning as his agents at the time of the default, yet missed the deadline for appeal because of a computational error. *See Coleman*, No. 89-7662, JA 28a-34a. The Court characterized that error as "[a]ttorney ignorance or inadvertence." 501 U.S. at 753. The kind of attorney conduct at issue here—outright abandonment—is fundamentally different under agency law and other principles. Pet. Br. 39-43.

That distinction is critical because the crux of this Court's conclusion in *Coleman* that the attorney error at issue was *not* "external" to the petitioner was the Court's determination that "[i]n a case, such as [*Coleman*], where the alleged attorney error is inadvertence in failing to file a timely notice, [excusing the client] would be contrary to well-settled principles of agency law." 501 U.S. at 754 (citing Restatement (Second) of Agency § 242 (1958)). As members of this Court have observed, "*Coleman* did not invent, but merely applied," established agency law. *Holland v. Florida*, 130 S. Ct. 2549, 2571 n.4 (2010) (Scalia, J., joined by Thomas, J., dissenting). Critically, agency law points to the opposite conclusion in a case, like this one, where the attorney conduct at issue is abandonment. Pet. Br. 37-50; DeMott Br. 13-14.

Holland v. Florida strongly reinforces that conclusion. In *Holland*, at least seven Justices recognized that attorney conduct amounting to abandonment is *not* fairly attributable to a client for

purposes of equitable tolling. *See* 130 S. Ct. at 2564; *id.* at 2568 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2573 n.9 (Scalia, J., joined by Thomas, J., dissenting) (seeming to recognize the same principle). Although this Court acknowledged that *Coleman* arose in a different context (procedural default), *id.* at 2563, the "same analysis applies" in determining whether attorney conduct is external, *id.* at 2567 (Alito, J.). If attorney conduct is "beyond [a client's] control" (*id.* at 2568 (same)) in one context, then logically the conduct must be beyond the client's control in the other context. Pet. Br. 42.[8]

This Court's cause doctrine is predicated on the common-sense proposition that it would be grossly inequitable to hold an inmate responsible for a default stemming from *external* factors. Yet Alabama and its amici ask this Court to hold that *Coleman* always precludes cause based on attorney conduct—even where "a petitioner had been truly abandoned and left without counsel during his state habeas proceedings." Texas Br. 3; *see* Ala. Br. 1, 15, 22-23, 37. That holding would require a fundamental expansion of *Coleman*, not to mention a complete disregard for the equitable principles on which habeas has always been grounded. Alabama has provided no sound basis to take that step.

Holding that *Coleman* does not extend to attorney abandonment will neither "blast a hole" (Ala. Br. 37) through *Coleman* nor "prove unworkable" (Texas Br.

---

[8] In *Holland*, the Court observed that procedural defaults implicate federalism concerns not present in equitable-tolling cases. 130 S. Ct. at 2563. But respect for federalism does not warrant a whole separate jurisprudence of when attorney conduct is external from the client—and does not warrant holding inmates responsible for defaults stemming from external factors.

1). *Coleman* will (as it always has) govern the mine run of attorney misconduct—like "ignorance or inadvertence"—that *is* constructively attributable to a client. 501 U.S. at 753-54. Moreover, the traditional law of agency and principles governing the attorney-client relationship provide ready and time-tested guideposts for determining what attorney conduct is external. *See Holland*, 130 S. Ct. at 2564-65; *Coleman*, 501 U.S. at 754; DeMott Br. 6-8. Those principles are just as workable here as they were in *Holland*.

B. Maples Was Abandoned By Counsel

Alabama's attempt to belittle the predicament that Maples faced should be rejected. Maples sat on death row awaiting a ruling in his Rule 32 proceeding under the reasonable belief that he was represented by counsel in that proceeding. To his shock and horror, he learned (for the first time) in August 2003 that this was not so when *the State's* attorney notified him that his Rule 32 petition had been denied and that he had defaulted on his appeal. Pet. App. 253a-54a.[9] Maples responded immediately and learned that his *pro bono*

---

[9] The State repeatedly cites a statement in Maples's Amended Rule 32 Petition that "Maples periodically met with his lawyers" (JA 257) and erroneously assumes that these meetings took place during the default period. Ala. Br. 9, 10, 17, 50, 53. The statement does not support that conclusion. And to be clear, Maples has advised counsel that the meetings referred to on JA 257 occurred *before* Ingen-Housz and Munanka left their law firm in 2002; Maples was never told that those attorneys had left their firm; and Maples was instead advised before the attorneys left that all they could do was await a decision and that such decisions frequently took time. So Maples waited for a decision (as many inmates do, *see* Ala. Appellate Court Justices Br. 30-31)—only to find out in August 2003 that he had been abandoned by counsel.

attorneys of record had left their firm without substituting counsel and that he had been left unrepresented in his Rule 32 proceeding by any functioning attorney. The State's position (at 18) is that Maples's counsel "did not abandon their client, temporarily or otherwise." That position defies common sense and fails as a matter of law and fact.

1. Abandonment is an act of disloyalty or renunciation that terminates the agency relationship. Pet. Br. 39-43; DeMott Br. 13-15. The State's principal response on abandonment is to try to shift the focus away from Maples's attorneys of record in his Rule 32 action—who obviously abandoned Maples—and argue (at 38) that Maples was represented by a "team of lawyers" who stayed on. The State likewise tries to shift the focus from what was happening at the time of the default to the alleged acts of attorneys months or years before—and even after—the default. *See* Ala. Br. 40-41. And the State even goes so far as at to claim (at 17, 46 (heading)) that the departure of Ingen-Housz and Munanka without substituting counsel or notifying Maples is "irrelevant." These arguments fail.

a. As the Alabama Rule 32 court found, the only attorneys who represented Maples in his Rule 32 proceeding were his *pro bono* attorneys of record (Ingen-Housz and Munanka) and local counsel (Butler). Pet. App. 223a; *id.* at 234a. The court specifically found that Marc DeLeeuw—on whom the State now focuses—did not represent Maples in that proceeding. *Id.* at 223a. Nor did any other attorney named by the State in its brief. Indeed, at all times relevant to the default, it would have been "unlawful" for them to act in that proceeding because they were not admitted to practice in Alabama. JA 372; *see* Pet. App. 223a. Thus,

as the Rule 32 court found, at the time of the default, Ingen-Housz and Munanka were *still* Maples's attorneys as a matter of Alabama law. Pet. App. 223a. Alabama is quite insistent that this Court should defer to its courts when it suits its interests. Ala. Br. 27. There is no basis to ignore the Alabama court's findings on who represented Maples in his Rule 32 proceeding.

The same conclusion follows as a matter of well-settled agency law. Alabama's position is that Maples was bound by the conduct of DeLeeuw and any other lawyer involved in his case in any way. But it is settled that an agent is powerless to bind a principal if he "fail[s] to acquire a qualification ... without which it is illegal to do an authorized act." Restatement (Second) of Agency § 111; *see* Pet. Br. 42. Alabama suggests (at 42) that § 111 is inapposite because it was not "impossible" for these lawyers to secure "admission *pro hoc*." But the underlying—and perfectly sensible—premise of § 111 is that "a principal does not intend an agent to do an illegal act." Restatement (Second) of Agency § 111 cmt. b. That principle applies whether an attorney lacks a license because he has not obtained it or has lost it. DeMott Br. 20. Not surprisingly, the State has failed to unearth a single case establishing that someone may be held responsible in a legal proceeding for the acts of a lawyer who never appeared on his behalf—and lacked authorization to do so.

b. Although the record is largely undeveloped on the role of attorneys other than Maples's counsel of record (*see* Pet. Br. 46), the record evidence is that Ingen-Housz and Munanka "performed all of the substantive work on Maples's Rule 32 case." Pet. App. 3a. DeLeeuw has said that he "agreed to handle the matter" after Ingen-Housz and Munanka had left

Sullivan & Cromwell (S&C) in 2002, JA 299, but the record is silent on what DeLeeuw actually did, and he also said that at that point they were simply "waiting for any further proceedings," JA 301; *see* JA 273. The State says (at 18, 54)—without record support—that Maples "consent[ed]" to DeLeeuw's asserted new role. But Maples was not even told that Ingen-Housz and Munanka had left S&C and he was not asked to (nor did) consent to DeLeeuw or any other lawyer taking the lead for his departed counsel of record.

Alabama says (at 1) that "Maples was represented by S&C itself." That is incorrect.[10] But even if S&C—in addition to Ingen-Housz and Munanka—had represented Maples, it would not change the analysis. It is settled that when a lawyer leaves her law firm, the ball shifts to *the client* to "choose whether to be represented by [the departing] lawyer, by lawyers

---

[10] The State omits key text of the very paragraph it cites for this argument, which qualifies the reference to S&C by referring to "the *two* Sullivan lawyers handling the matter"—Ingen-Housz and Munanka. JA 257 & n.2 (emphasis added). This argument is also contradicted by the Alabama court's findings (which did not identify S&C as counsel for Maples), Pet. App. 223a; the sworn testimony of DeLeeuw (who explained that S&C lawyers "handle *pro bono* cases on an individual basis"), *id.* at 257a; and the fact that S&C's name was generally omitted from court filings and correspondence. While it may be more typical for a firm to assume the representation, the firm is not required to do so. *See, e.g.*, Restatement (Third) of The Law Governing Lawyers § 14, cmt. h (2000) (law firm usually undertakes representation "*unless* the circumstances indicate otherwise") (emphasis added); N.Y.C. Bar Ass'n Pro Bono & Legal Service Comm., *International Pro Bono Representations: Tips for Volunteer Lawyers* at 2 (2007), *available at* http://www.nycbar.org/pdf/report/Lawyers'%20Guide.pdf (recognizing that law-firm attorneys may undertake *pro bono* cases in "individual capacity" or on behalf of law firm).

remaining at the firm, by neither, or both." Restatement (Third) of the Law Governing Lawyers § 31 cmt. f (2000); *see id.* § 14 cmt. h (same). Maples never made that determination and, indeed, was not even told that Ingen-Housz and Munanka had left S&C.

c. In any event, to the extent that other attorneys (or S&C itself) did represent Maples in his Rule 32 proceeding, it underscores—rather than undermines—the conclusion that Maples was abandoned. Under the State's theory of the case, other attorneys knew that Maples's attorneys of record had left without substituting counsel and thus knew that Maples was left without an attorney authorized to act on his behalf in his Rule 32 proceeding—and yet did nothing. That is, if anything, an even more stark act of abandonment than the departure of his attorneys of record without substituting counsel (if they assumed that someone else would step into their shoes). DeMott Br. 20-21; Legal Ethics Br. 15-18. Maples does not question the sincerity or intentions of those who have sought to assist him. But whatever their intentions or assumptions, the bottom line is that he was abandoned by counsel in his Rule 32 proceeding.[11]

2. The State does not devote much attention in its brief to the attorneys that, according to the Alabama courts, actually represented Maples in his Rule 32 proceeding. But what it does say in no way alters the conclusion that Maples was abandoned. Astonishingly,

---

[11] Alabama suggests (at 51-53) that Maples was not abandoned because he "made no attempt to terminate counsel." But Maples reasonably believed he was represented by counsel. The fact that his attorneys of record left him without notifying him underscores that this is a case of abandonment pure and simple.

the State argues (at 46) that Ingen-Housz and Munanka "discharged ... in full" their duty to "'protect [their] client's interests.'" But ultimately even the State acknowledges (at 47) that they "did do one thing wrong"—they failed to obtain the court's approval to withdraw, as required by Alabama law. That is like saying that Edward Smith fully discharged his duty as captain of the Titanic, he just did one thing wrong—he forgot to look for icebergs. Whatever their intentions for not doing so, the Alabama rules undeniably place the duty on *departing counsel* to obtain court approval before withdrawing. Ala. R. Crim. P. 6.2(c); *see* Ala. Br. 47. The very purpose of that rule is "to protect the interests of the defendant." Ala. R. Crim. P. 6.2(c) cmt. By leaving without substituting counsel, Ingen-Housz and Munanka—who remained Maples's attorneys as far as the Rule 32 court was concerned, Pet. App. 223a—abandoned Maples. Pet. Br. 43-47; DeMott Br. 11-15.

Alabama's response is no less startling when it comes to Butler. The State acknowledges (at 11) that Butler intentionally assumed no role other than facilitating the *pro hac* admission of Maples's out-of-state attorneys. Pet. Br. 48; JA 228-29, 257-58. But the State argues (at 43-44) that this arrangement was just fine, and that Butler's actions "after" the default show that Butler did not abandon Maples. But what Butler did *after* the default cannot enlarge (or rehabilitate) his conduct before the default. And given that Alabama has essentially conceded that Butler played "no ... role" (Pet. App. 257a) but to allow the admission of Ingen-Housz and Munanka, the State can no longer seriously deny that—at the time of the default—Butler "was not operating as [Maples's] agent in any

meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J.). *See* Pet. Br. 48-50; ACDL Br. 8.

The State stresses (at 31) local counsel's "joint and several responsibility" under Alabama law. But the fact that Butler's conduct violated his professional responsibilities does not undo the abandonment, as Alabama perversely seems to argue (at 42-43). If it did, then no client could *ever* be abandoned simply by virtue of the fact that abandonment violates bar rules. And the fact that—according to Alabama (at 43)—local counsel could be subjected to bar discipline or the like "if something went wrong" does not mean that Butler was acting as Maples's agent at the time of the default.

C. At A Minimum, The Court Should Remand

As a matter of law, the record before the Court supports a finding of cause. But if this Court disagrees and believes that any of the factual issues raised by Alabama are relevant, it should at least reverse and remand for an evidentiary hearing. *See Holland*, 130 S. Ct. at 2565. As discussed, the State's position is based on an erroneous, incomplete, and misleading view of pertinent events and relationships. Maples's recollection of events, along with attorney correspondence in his possession, contradicts the State's characterization of pertinent events in material respects. But because there has never been an evidentiary hearing into these matters, the record is not fully developed on these matters (and thus, Maples in no way suggests that the State has intentionally misstated any facts). At a minimum, the Court should

remand for such a hearing if it concludes that any factual issues raised by the State are relevant.[12]

* * * * *

"It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O'Connor, J., concurring in the judgment). The Alabama system for post-conviction review in capital cases is plagued by major structural flaws. Pet. Br. 3-6; Ala. Appellate Court Justices Br. 4-28; NACDL Br. 17-22. In this case, that system facilitated a series of external events beyond Maples's control that the State now says cut off federal habeas review of serious constitutional claims. Under this Court's precedents, Maples has shown cause to excuse that default. Any other conclusion would deprive Maples of the meaningful access to the judicial process that the Constitution requires. *See* Pet. Br. 30 n.4; Const'n Project Br. 11-15.[13]

---

[12] Alabama's suggestion of waiver (at 13) is unfounded. *See* Cert. Reply 9-10. Maples argued below that attorney conduct established cause, *e.g.*, 11th Cir. Br. 17, and the Eleventh Circuit passed on that argument, Pet. App. 17a. To the extent that the State objects to the "precise arguments" made below, it is settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim [in this Court]." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Maples's arguments also are undeniably within the scope of the question on which this Court granted certiorari. *See also* Legal Ethics Br. 29-30.

[13] If this Court concludes that Maples has not shown cause, it should hold this case for *Martinez v. Ryan*, No. 10-1001. Maples has raised the question whether his post-conviction representation violated the Constitution. *See, e.g.*, Pet. Br. 36; 11th Cir. Reh'g

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

August 1, 2011

Pet. 14 n.3. And because the Alabama court requested Maples's trial counsel to "stay in the case for purposes of post trial motions" (R. 3390), and new appellate counsel was not appointed until later, a Rule 32 petition was Maples's first opportunity to challenge the assistance he received from trial-level counsel. Pet. Br. 9.

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FEB 24 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

RICHARD F. ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. PLENARY REVIEW IS WARRANTED 3

II. AT A MINIMUM, A "GVR" IS WARRANTED 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Beard v. Kindler,
130 S. Ct. 612 (2009) 4

Coleman v. Thomson,
501 U.S. 722 (1991) 7

Holland v. Florida,
130 S. Ct. 2549 (2010) 3, 7

Jefferson v. Upton,
130 S. Ct. 2217 (2010) 9

Jones v. Flowers,
547 U.S. 220 (2006) 2, 7

Kennedy v. Louisiana,
554 U.S. 407 (2008) 9

Lawrence v. Chater,
516 U.S. 163 (1996) 10

Lee v. Kemna,
534 U.S. 362 (2002) 4, 7

Magwood v. Culliver,
130 S. Ct. 624 (2009) 9

Murray v. Giarratano,
492 U.S. 1 (1989) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Schwarzenegger v. Entertainment Merchants Association,
130 S. Ct. 2398 (2010) 3

Sears v. Upton,
130 S. Ct. 3259 (2010) 9

Walker v. Martin,
No. 09-996, slip op. (Feb. 23, 2011) ..... *passim*

Youngblood v. West Virginia,
547 U.S. 867 (2006) 11

OTHER AUTHORITY

Ala. R. Crim. P. 32.1(f) 10

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner hereby submits this supplemental brief in response to the Court's decision in *Walker v. Martin*, No. 09-996, slip op. (Feb. 23, 2011), which addresses the adequacy of a discretionary California timeliness requirement under the procedural default doctrine.

INTRODUCTION

The death-row petitioner in this case, Cory Maples, is just one court—this Court—away from being executed despite an almost unimaginable series of events that have thus far deprived him of federal habeas review on the merits of serious constitutional claims, even though all agree he bears no fault for that predicament. As explained by the petition and multiple amicus briefs filed in support of certiorari, the divided Eleventh Circuit decision holding that Maples may be executed without federal court review of his constitutional claims not only directly conflicts with the decisions of this Court and those of other circuits, but raises issues of exceptional national importance warranting resolution by this Court. Although the grave injustice that would be done by executing a man in these circumstances alone calls for plenary review by the Nation's highest Court, the questions presented meet the Court's customary criteria for certiorari. *Walker* only strengthens the case for certiorari.

The Court's decision in *Walker* underscores why certiorari is needed on the first question presented by the petition—while taking nothing away from the need for plenary review on the second question. In *Walker*, this Court not only admonished that "federal courts must carefully examine state procedural requirements

to ensure that they do not operate to discriminate against claims of federal rights," but also stressed that "a state rule must be 'firmly established and regularly followed'" to be adequate and that the "exorbitant application" of an otherwise sound state rule may render it inadequate. *Walker*, slip op. at 13, 7, 8 n.4. *Walker*'s teachings on both the central requirements and importance of the adequacy doctrine confirm that the Eleventh Circuit's conception of that doctrine was profoundly misguided. At the same time, because *Walker* involved a relatively uncommon *discretionary* timeliness rule, the decision does not eliminate the need for review to clarify when a mandatory state procedural rule such as the Alabama "no-fault out-of-time appeal" rule at issue is inadequate to bar federal review because it is inconsistently, discriminatorily, or arbitrarily applied. That question implicates multiple circuit splits left unresolved by *Walker* that are even more glaring in *Walker*'s wake. Pet.12-21, 32-33.

Certiorari also is warranted to review the second question presented, concerning the Eleventh Circuit's remarkable holding that Maples failed to establish cause to excuse a procedural default that all acknowledge was not his fault. As explained in the petition and by amici, the divided court of appeals utterly failed to account for the State's own culpability for the procedural default when a state court clerk received the unopened and unclaimed letters addressed to Maples' lead counsel and just stuck them in a file drawer, in blatant conflict with this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006). Likewise, the court erred by finding that Maples could be held culpable for the actions of attorneys "who [were] not operating as his agent in any meaningful sense of that word," notwithstanding that "[c]ommon sense dictates

that a litigant cannot be held constructively responsible for the conduct of [such] an attorney," *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring). The Eleventh Circuit's decision on cause is irreconcilable with this Court's precedents, and conflicts with the decisions of other circuit courts and state courts of last resort. Pet.24-32.

This Court often holds a petition to see if a pending merits case will eliminate the need for plenary review, and then grants certiorari when it does not. *See, e.g.*, *Schwarzenegger v. Entertainment Merchants Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448). That is the case here. The petition should be granted and set for plenary review or, at a minimum, the Court should vacate the decision below and send the case back to the Eleventh Circuit for further consideration in light of *Walker* and other precedents bearing on the questions presented.

ARGUMENT

I. PLENARY REVIEW IS WARRANTED

1. In *Walker*, this Court removed any doubt that the adequacy doctrine remains a vital safeguard for ensuring that federal habeas review of constitutional claims is not defeated by the arbitrary application of state rules. It therefore rejected invitations to "scrap" adequacy analysis altogether, Criminal Justice Legal Foundation Brief in Support of Certiorari in *Walker* 15; *Walker* Pet.Br.24 & n.1, and instead reinforced critical aspects of the doctrine. The Court admonished that "[t]o qualify as an 'adequate' procedural ground, a state rule must be firmly established and regularly followed." *Walker*, slip op. at 7. State bars are therefore inadequate when they ""impose novel and

unforeseeable requirements without fair or substantial support in prior state law.'" *Id.* at 12 (citation omitted). In addition, the Court recognized that in "exceptional cases ... exorbitant application of [even] a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* at 8 n.4 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). In short, at a time when some—such as amicus Criminal Justice Legal Foundation—apparently believed that the Court was predisposed to *dispense* with the adequacy doctrine, the Court unanimously embraced it.

Of course, in *Walker* the Court also reaffirmed its recent holding in *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009), that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." "Guided by that decision," this Court held that California is not foreclosed from applying a discretionary timeliness bar under which post-conviction claims may be defaulted when "substantially delayed without justification." *Walker*, slip op. at 1-2. The Court concluded that California's time rule was "firmly established," because "California's case law made it altogether plain" that a five-year delay was "substantial." *Id.* at 9. The Court then concluded that California's rule was "regularly followed," noting that "a *discretionary* rule ought not be disregarded automatically upon a showing of seeming inconsistencies." *Id.* at 11 (emphasis added). Accordingly, the Court unanimously held that the discretionary state rule in *Walker* was adequate.

2. *Walker* reinforces why certiorari is warranted in this case on the first question presented. The Eleventh Circuit's split decision on the adequacy question is fundamentally out of step with this Court's teachings in *Walker* on the importance of the adequacy doctrine and

its central requirements that a rule must be "firmly established" and "regularly followed" to be adequate—and may be inadequate when applied "'to impose novel and unforeseen requirements.'" *Walker*, slip op. at 12 (citation omitted)

The decision in *Walker* does not eliminate the need for review in this case. As explained by Maples's amicus brief in *Walker*, *Walker* is "hardly representative of the typical case in which the adequacy issue arises on federal habeas." *Walker* Brief for Cory R. Maples 23 (Oct. 27, 2010) (heading) (capitalization altered). While the Court's decisions in *Beard* and *Walker* have helped address the adequacy of *discretionary* rules generally, they do not eliminate the serious confusion that exists concerning more common adequacy cases involving the question of when a particular mandatory state procedural rule should be deemed "firmly established and regularly followed" in a given case. *See* Pet.12-13, 21; NACDL.Br.4-5.

Both states and habeas petitioners have consistently urged this Court to "further clarify the rules relating to the 'adequacy' of state procedural bars." *Walker* Petition for Writ of Certiorari 6 (U.S. Feb. 17, 2010) (California); Petition for Writ of Certiorari 6, *Beard v. Kindler*, No. 08-992 (U.S. Feb. 2, 2009) (criticizing development of doctrine as "uneven") (Pennsylvania); Petition for Writ of Certiorari 21, *Cone v. Bell*, No. 07-1114 (Feb. 25, 2008). As the multiple amici that have filed in support of certiorari have emphasized, this is an ideal case for providing needed guidance on the adequacy doctrine. The fact that this Court has just decided an adequacy case in *Walker* provides no more reason to deny certiorari here than the Court's recent decision in *Beard* provided a reason to deny certiorari in *Walker*. Indeed, *Walker*

presented an application of *Beard*. This case would permit the Court to address the more common situations in which adequacy issues have arisen—outside the context of discretionary rules.

Unlike the narrow issue in *Walker*, this case directly implicates many of the most important circuit splits concerning when a mandatory state procedural rule should be deemed "firmly established and regularly followed": (1) the circumstances under which indeterminate exceptions or inconsistent application make a state procedural rule inadequate to bar federal review, Pet.20; (2) the extent to which *post hoc* analysis by federal courts or later decisions by state courts may be relied upon to harmonize state decisions that appeared inconsistent at the time, Pet.20-21; and (3) the proper allocation of the burden of proof in determining the adequacy of a state procedural rule, Pet.19-20. The Eleventh Circuit's application of the adequacy doctrine in this case—holding that Alabama's "no-fault out-of-time appeal" rule inexplicably *barred* federal habeas review in a case where all agree that the petitioner was *not* at fault for the missed appeal—is egregious and merits review. Pet.13-19; Pet.Reply.3-7.

3. The petition also presents a second question that independently merits certiorari and is not affected by *Walker* concerning the circumstances in which a habeas petitioner may establish cause when all agree he is not at fault. Alabama provided constitutionally inadequate notice of the state court decision denying Maples's petition for post-conviction relief. Although the Alabama Court of Appeals found that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," Pet.7, App.234a, the state court clerk indisputably did *nothing* when the copies of the order sent to Maples's

pro bono attorneys of record in New York were returned unopened and marked "Return to Sender—Attempted Unknown" or "Return to Sender—Left Firm." Pet.6; Pet.Reply.7a-8a (letters). The Eleventh Circuit's decision holding that Maples failed to establish cause directly conflicts with this Court's decision in *Jones v. Flowers*, 547 U.S. at 229. And Alabama's failure to even *attempt* to justify its own actions under *Jones* speaks volumes. Pet.Reply.2.

Further, the Eleventh Circuit's belief that *Coleman v. Thomson*, 501 U.S. 722 (1991), required Maples to bear responsibility for missed deadlines stemming from *all* attorney misconduct—even when rising to abandonment—cannot be squared with this Court's recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010). Even the dissent in *Holland* recognized that a petitioner cannot be held constructively responsible for a lawyer's conduct if the lawyers' actions severed the agency relationship or amounted to disloyalty. 130 S. Ct. at 2573 n.9. And in conflict with the decision below, numerous federal courts of appeals and state courts have concluded that a procedural default precipitated by an effective abandonment by counsel would constitute extraordinary circumstances external to the party's own conduct—and thus cause. *See* Pet.29-30.[1]

---

[1] Abandonment goes to the adequacy issue as well. Only last term, a *majority* of States—in a brief authored by Petitioner in Walker—told this Court that a state procedural rule may be inadequate when applied to deprive a litigant of "merits review of his federal claim ... in an extreme case of abandonment [because] it might not qualify as affording fair notice." Brief for California et al. as Amicus Curiae, *Beard v. Walker*, 130 S. Ct. 612 (2009); *see also Lee*, 534 U.S. at 376; Pet. 18-19 (noting that in an "exceptional

As amici have explained, the second question presented merits certiorari in its own right. *See, e.g.*, Constitution Project.Br.7-16; Alabama Appellate Court Justices and Bar Presidents.Br.14-23.

4. The extraordinary importance of both questions presented—underscored by the breadth of amicus participation on both issues—weigh strongly in favor of granting certiorari. The questions presented are frequently recurring, and in capital cases their answers may literally mean the difference between life and death. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (noting that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings"). Moreover, the decision below will effect countless others on adequacy as well as cause, because the Eleventh Circuit has the third highest number of habeas petitions filed each year and the third highest number of habeas petitions in capital cases of any federal circuit. Pet.Reply10-11.

The fact that this case originated from Alabama heightens its importance too, as amici have explained. Alabama has more death row inmates per capita than any other state in the country. NACDL.Br.14. And unlike nearly all other states, Alabama does not provide counsel to inmates on death row, notwithstanding that Justice Department statistics show that *one-third* of Alabama death sentences are overturned when actually evaluated on the merits. NACDL.Br.15-16. As this case illustrates, the

---

cases," the application of an otherwise "sound rule renders the state ground inadequate to stop consideration of a federal question.").

arbitrary rules governing access to the federal courts established by the decision below are likely to impose unique hardships on habeas petitioners in Alabama. That is especially true for death row inmates like Maples, who, as amici have explained, already face exceptional burdens under Alabama's legal system for capital cases. *See* NACDL.Br.14-18; ACDLA.Br.12-21; Alabama Appellate Court Justices and Bar Presidents.Br.14-23.

The horrific facts of this case—which already have received national attention—also increase the importance of certiorari. Allowing a man to be put to death without any federal habeas review of the merits of serious constitutional claims like Maples's may call into question the legitimacy of the system of capital punishment and "transgress[] the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Appreciating the gravity of the interests at stake, this Court not infrequently summarily reverses in capital cases even where the traditional requirements for certiorari may not be met. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010); *Magwood v. Culliver*, 130 S. Ct. 624 (2009). Here, the customary requirements for certiorari are met—but the decision below is just, if not more, egregious as those that this Court has seen fit to summarily reverse.

II. AT A MINIMUM, A "GVR" IS WARRANTED

At the least, the Court should GVR this case. The Eleventh Circuit not only ignored requirements of the adequacy doctrine underscored in *Walker*, but rested on at least two propositions that this Court did not embrace in *Walker*. First, the court below appeared to find that a state's inconsistent application of its

procedural rules would *not* bar the adequacy of that rule, *see* Pet.App.12a, effectively tracking the State's suggestion in *Walker* that "'inconsistent' application in the state's enforcement of its procedural rule in other cases is *immaterial* to 'adequacy.'" *Walker* Pet.Br.25 (Aug. 25, 2010) (heading) (capitalization altered) (emphasis added). But this Court rejected that position in *Walker*, reaffirming that a state procedural rule must be "firmly established and regularly followed." *Walker*, slip op. at 7 (citation omitted).

Second, the court below held that Maples could not demonstrate the inadequacy of Alabama's rule because Maples could "point to no Alabama case where an out-of-time appeal has been granted in circumstances such as his case." Pet.App.16a. In effect, it concluded that Maples was doomed because he could not point to a case exhibiting *precisely* identical facts in which an appeal was granted, notwithstanding the rule's plain language mandating relief where a petitioner "failed to appeal within the prescribed time ... and that failure was without fault on the petitioner's part," Ala. R. Crim. P. 32.1(f), and highly analogous state case law. As the dissent below explained, there is Alabama case law directly on point. Pet.App.27-30 (dissent). But in any event, *Walker* teaches that the adequacy inquiry is not driven by the ability to point to a decision applying the state procedural rule to *identical* facts.

This Court has emphasized that the GVR mechanism permits the Court to account for the "equities of the case," *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam), a factor that weighs heavily in favor of action here. Nor has the Court hesitated to GVR cases where the lower court failed adequately to examine specific claims essential to the judgment, simply to give this Court the benefit of the

lower court's views on issues that might affect this Court's ultimate review of the case. *See, e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). In this case, the Eleventh Circuit's decision predates *Walker* and *Holland*, and does not even discuss *Jones v. Flowers*, all cases bearing upon the judgment reached below. Although only plenary review would permit this Court to resolve the substantial confusion surrounding the important questions presented, at a minimum the Court should GVR to permit the Eleventh Circuit to consider *Walker* and the substantial and directly relevant authority of this Court not discussed in its decision.

CONCLUSION

For the foregoing reasons, and those in the petition for certiorari and reply brief in support of certiorari, the petition for certiorari should be granted and set for plenary review or, at a minimum, granted so that the decision below may be vacated and the case remanded for further consideration for the reasons herein.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
MAR 3 - 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS,
ACTING COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Beard v. Kindler,
130 S. Ct. 612 (2009) 2

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 6

Black v. United States,
130 S. Ct. 2963 (2010) 2

Bostick v. Stevenson,
589 F.3d 160 (4th Cir. 2009) 4

Erickson v. Pardus,
551 U.S. 89 (2007) 6

Ex parte Ingram,
675 So. 2d 863 (Ala. 1996) 8

Ford v. Georgia,
498 U.S. 411 (1991) 5

Marshall v. State,
884 So. 2d 898 (Ala. Crim. App. 2002) 5

Noble v. State,
708 So. 2d 217 (Ala. Crim. App. 1997) 4

Skilling v. United States,
130 S. Ct. 2896 (2010) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Walker v. Martin,
No. 09-996 (Feb. 23, 2011) 1, 3, 5, 6, 8

Weyhrauch v. United States,
130 S. Ct. 2971 (2010) 2

OTHER AUTHORITY

Ala. R. Crim. P. 32.1(f) 4

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner hereby submits this supplemental brief in response to the intervening supplemental brief filed by respondent.

ARGUMENT

The State's supplemental brief misconceives the significance of this Court's decision in *Walker v. Martin*, No. 09-996, slip op. (Feb. 23, 2011), mischaracterizes the first question presented by this case, and only underscores the need for certiorari.[1]

1. The State's central contention is that "*Walker* changed nothing." Resp.Supp.Br.9. Maples disagrees and has explained that *Walker* reinforces important aspects of the adequacy doctrine and casts even further doubt on the legitimacy of the divided Eleventh Circuit decision in this case. Pet.Supp.Br.3-6. But if the State is right, then *Walker* only reinforces the need for certiorari. Indeed, the State itself acknowledges (at 2) that *Walker* did not resolve the circuit splits discussed in the petition concerning when the inconsistent application of state law renders a procedural rule inadequate, whether a court may base an adequacy determination upon a *post hoc* analysis of state law or decisions issued *after* the events in question, and which party bears the burden of proof in determining the adequacy of a state rule. Pet.19-21. Those circuit splits

---

[1] The State acknowledges that the second question presented is not affected by the Court's decision in *Walker*. Resp.Supp.Br.1, 9. It nevertheless goes on to suggest that this issue—which itself warrants certiorari—was "not raised below." Resp.Supp.Br.9. That is incorrect. Pet.Reply.8-10, 1a-6a.

concern critical aspects of the adequacy doctrine—going to the heart of the determination whether a state rule is "firmly established" and "regularly followed."

Moreover, the confusion surrounding the adequacy doctrine is both widespread and well documented. *See* Pet.12-13; NACDL.Br.4-5. Indeed, in *Walker*, California told this Court that certiorari was "need[ed] to further clarify the rules relating to the 'adequacy' of state procedural bars," citing this Court's own statement in *Beard v. Kindler*, 130 S. Ct. 612 (2009), that *Beard* "presented an 'unsuitable vehicle for providing broad guidance on the adequate state ground doctrine.'" *Walker* Petition for Writ of Certiorari 6 (U.S. Feb. 17, 2010) (quoting *Beard*, 130 S. Ct. at 619); *see also Walker* Br. for Criminal Justice Legal Foundation in Support of Certiorari 9 (U.S. Mar. 24, 2010). If Alabama is correct that "*Walker* changed nothing," Resp.Supp.Br.9, then *Walker* does "nothing" to resolve the need for guidance from this Court.

It is true that granting certiorari in this case would mean delving into the adequacy doctrine for the third time in the past few terms. Resp.Supp.Br.3. But it is not unusual for the Court to address an area of law with broad application that has generated widespread confusion by granting certiorari in more than one case to enable the Court to address the issue from the different perspectives that different cases may bring. *Cf., e.g., Skilling v. United States*, 130 S. Ct. 2896 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010); *Black v. United States*, 130 S. Ct. 2963 (2010). This case presents a timely and well-suited vehicle to provide the clarification that—according to the State's own assessment of *Walker*—is still needed.

2. Alabama's efforts to deconstruct *Walker* and remake it into a tool that advances its cause likewise

bolster the need for review. The State emphasizes the Court's observations that "'[a] *discretionary* rule ought not be disregarded automatically upon a showing of *seeming* inconsistencies'" and that the adequacy doctrine does not preclude the "'*appropriate* exercise of discretion.'" Resp.Supp.Br.5, 2 (quoting *Walker*, slip op. at 11, 8 (emphases added)). The State then extrapolates that, "even if the Alabama courts applied their discretion inconsistently between Maples' case and a similar case ... , this Court closed the door on Maples' FERF argument in *Walker*." Resp.Supp.Br.5. In other words, the State's main take-away is that *Walker* lowers the bar for determining when the inconsistent application of a state procedural rule renders the rule inadequate. *See also* Resp.Supp.Br.4 (suggesting that this case should be subject to "*less stringent* FERF review"). But that argument fails to appreciate *Walker*'s unanimous *affirmation* that the adequacy doctrine remains a vital safeguard against the arbitrary use of state rules to bar federal claims (*see* Pet.Supp.Br.3-4) and overlooks the fundamental difference between discretionary and mandatory rules.

Walker involved a discretionary timing rule that gave state courts broad leeway to determine when a state habeas petition was timely. As described by this Court, the California rule at issue directed habeas petitioners "to file known claims 'as promptly as the circumstances allow,'" *Walker*, slip op. at 1 (citation omitted), and without "'substantial delay,'" *id.* at 3 (quoting state cases). In holding that that rule was adequate as applied in *Walker*, the Court stressed that "'[s]ound procedure often requires discretion to extract or excuse compliance with strict rules,' and we have no cause to discourage standards allowing courts to exercise such discretion." *Id.* at 12 (citation omitted).

Unlike the discretionary rule at issue in *Walker*, the procedural rule at issue here is mandatory in nature. Alabama again inexplicably suggests—as it did in its brief in opposition, *see* Pet.Reply.3-4—that the adequacy question is trained on the State's general 42-day deadline for appeals. *See* Resp.Supp.Br.3-6. In fact, however, the adequacy issue presented here concerns Alabama's written procedural rule providing for an out-of-time appeal when "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). *See also* Pet.13-14; Pet.Reply.3-4.[2] As the State recognized before this case reached this Court, Rule 32.1(f) establishes a stand-alone "no-fault, out-of-time-appeal rule." CA11.Appellees.Br.16; *see* Pet.Reply.4. Under that rule, when an inmate is not at fault for the failure to appeal within the prescribed time period—as the State does not dispute is the case for the inmate here—the inmate is "*entitled* to an out-of-time appeal." *Noble v. State*, 708 So. 2d 217, 217 (Ala. Crim. App. 1997) (emphasis added); *see* Pet.Reply.6-7.

As courts have recognized, the equation changes considerably when the procedural rule changes from discretionary to mandatory. *See, e.g., Bostick v.*

---

[2] The State repeatedly refers to the procedural rule at issue as the "Alabama's 42-day deadline" and mentions Rule 32.1(f)'s express, no-fault out-of-time appeal rule only once in passing. Resp.Supp.Br.5. As Maples has explained, the general 42-day rule in no way supersedes Rule 32.1(f) or the cases applying it. Pet.Reply.4. And the State's remarkable effort to bury Rule 32.1(f) in the sand only highlights that it has no persuasive response to the adequacy question actually presented by this case.

Stevenson, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("In *Kindler*, the [Supreme] Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily.") (internal citations omitted). Whatever arguable inconsistencies may be inherent in (and thus tolerable for) the application of a discretionary rule, the inconsistent application of a mandatory rule to similar circumstances is a hallmark of inadequacy. *See Ford v. Georgia*, 498 U.S. 411, 425 (1991) (unanimously holding that "state court's inconsistent application of [mandatory procedural rule]" would violate the adequacy requirement).

Such arbitrariness is particularly stark in this case. In *Walker*, the Court concluded that California case law made it "altogether plain" that the discretionary rule at issue there was fairly applied to bar review of a habeas petition filed five years late. *Walker*, slip op. at 9. But in this case, in stark contrast, the state courts have excused untimely appeals based on "indistinguishable facts"—creating a blatant inconsistency. Pet.App.30a (dissent) (discussing *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002)). Far from sanctioning such arbitrary results—even in the case of discretionary rules—*Walker* teaches that state procedural rules may not be invoked "'to impose novel and unforeseeable requirements.'" *Walker*, slip op. at 12 (citation omitted).

Even putting aside the important distinction between mandatory and discretionary rules (which the State erroneously dismisses as a "distinction without a difference," Resp.Supp.Br.4), the State mistakenly construes *Walker* as "clos[ing] the door" on arguments that the inconsistent and arbitrary application of

procedural rules in analogous circumstances renders a rule inadequate. Resp.Supp.Br.5. *Walker* hardly closes that door. As noted, in *Walker* extant case law made it "altogether plain" that the state rule was properly applied to bar review of federal claims. *Walker*, slip op. at 9. Here, just the opposite is true. *See* Pet.13-19; ACDL.Br.3-12. Moreover, whereas in *Walker* the Court noted that "'seeming inconsistencie[s]'" dissipated on "closer inspection," *Walker*, slip op. at 11 n.7 (citation omitted), here the inconsistencies only become more glaring on further inspection. *See* Pet.Reply.5-7; Pet.App.28a-30a; ACDL.Br.8-9. Accordingly, the Eleventh Circuit could only ground its adequacy determination on a *post hoc* reformulation of Alabama case law based on distinctions nowhere found in the cases themselves. Pet.17-18; Pet.App.13a.[3]

3. The State is also off base in claiming (at 1) that the Eleventh Circuit "correctly applied" this Court's

---

[3] The State also suggests (at 9) that *Walker* cannot help Maples because the Court decided the adequacy issue in favor of the State, not the inmate. But the fact that the Court held that the discretionary rule at issue in *Walker* was adequate takes nothing away from the need to grant certiorari in this case to hold that the arbitrary rule created to bar review of Maples's constitutional claims was *in*adequate. *Compare, e.g., Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam). The petition for certiorari in *Erickson* was relisted several times at the certiorari stage, presumably to await the Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The fact that the Court held in *Bell Atlantic* by a 7-2 decision that the complaint at issue *failed* to state a claim under the civil pleading standards at issue in *Bell Atlantic* did not prevent the Court from granting certiorari in *Erickson* and holding (by way of summary disposition) that the complaint in that case *met* those standards.

adequacy doctrine in holding that Maples was not entitled to federal habeas review of his ineffective assistance of counsel claims. The State contends that in reaching its result, the court of appeals simply "followed long-standing rules." Resp.Supp.Br.3. But as the dissent below explained, the Eleventh Circuit majority seriously departed from this Court's precedents in holding that the procedural bar at issue was adequate. Pet.App.27a-32a. And the Eleventh Circuit's adequacy ruling contravenes each of the primary justifications that this Court has articulated for the adequacy rule, including in *Walker*.

Fair notice—Alabama admits that a procedural rule is inadequate if it does not provide fair notice of its requirements. Resp.Supp.Br.3. In this case, the divided Eleventh Circuit concluded that Alabama's written no-fault out-of-time appeal rule was "firmly established and regularly followed" such as to deny relief to Maples even though (1) Rule 32.1(f) appears on its face to *grant* out-of-time appeals where, as here, the inmate is not at fault; (2) the Eleventh Circuit relied for its adequacy finding on Alabama case law decided *after* the alleged default (which, by definition, no one could have had notice of), Pet.20; (3) relief had been granted in other cases based on "indistinguishable facts," Pet.App.30a (dissent); and (4) the Eleventh Circuit sought to distinguish those cases by advancing a *post hoc* interpretation of the rule articulated nowhere in Alabama state cases themselves. Such a novel and unforeseen rule is the epitome of an inadequate rule.

Inconsistent Application—As discussed, Alabama contends that in the wake of *Walker* its rule is "FERF, even if Maples can point to a case in which Alabama courts seemingly applied their discretion inconsistently when deciding whether to excuse a tardy appeal."

Resp.Supp.Br.6. But this Court did nothing in *Walker* to backtrack from the settled principle that a mandatory state procedural rule must be "firmly established and regularly followed" to bar review of federal claims. *See Walker*, slip op. at 7. Moreover, the Court stressed that novel, unforeseen, and arbitrary state rules are inadequate. *See id.* at 8 n.4, 12.

Discrimination Against Federal Rights—Although the distinction is found nowhere on the face of Alabama's no-fault out-of-time appeal rule itself, the divided Eleventh Circuit accepted Alabama's argument that (among other things) the rule was generally, though not always, applicable only to *direct*, rather than post-conviction appeals. Pet.App.13a. As Maples explained in his petition, Alabama's courts had, in fact, squarely applied the rule in the context of post-conviction appeals on multiple occasions, and the text of Rule 32.1(f) does not support such a distinction. *See* Pet.13-14. Regardless, the State's *post hoc* explanation has the unmistakable effect of discriminating against *federal* rights. A rule that arbitrarily excuses missed deadlines for which a petitioner is blameless at the direct appeal stage, but not the post-conviction stage, necessarily discriminates against claims that typically cannot be brought until the post-conviction stage, including ineffective assistance of counsel claims. *See* Pet.5; *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

Exorbitant Application—In *Walker*, this Court observed that the "'exorbitant application of [even] a generally sound rule renders the state ground inadequate to stop consideration of a federal question.'" *Walker*, slip op. at 8 n.4 (citation omitted); Pet.Supp.Br.7 n.1. Alabama has never explained how the State has a legitimate interest in barring a capital inmate from merely presenting his federal claims—

even if that inmate was abandoned by his attorneys and the state provided constitutionally inadequate notice of the order from which all agree he failed to appeal through no fault of his own. *See, e.g.*, Pet.5-7; 24-32. And—unlike Alabama—a majority of other states have suggested that an otherwise sound rule would be inadequate to bar review here. Pet.Supp.Br.7 n.1. If the application of Alabama's no-fault out-of-time rule to *bar* Maples's appeal is not an "exorbitant application" requiring a finding of inadequacy, then it is difficult to see what could possibly qualify as one.

4. In the end, Alabama falls back on the jarring and misguided theme of its opposition brief: that certiorari is not warranted because Maples purportedly "is in the same boat as hundreds of other appellants" who have missed deadlines for appeals. Resp.Supp.Br.9. But the difference is that Alabama has an express "no-fault out-of-time appeal" rule, Pet.Reply.4; that rule has been applied by the Alabama courts to allow untimely appeals in "indistinguishable" circumstances, Pet.App.30a (dissent); and no one disputes that Maples was *not* at fault for the missed deadline in his case. Only the arbitrary, discriminatory, and exorbitant application of the State's no-fault out-of-time appeal rule could result in the paradoxical conclusion that Maples's appeal was *barred* in these circumstances. And that is precisely the situation that this Court's adequacy doctrine is designed to protect against.

The State likewise suggests that the Court should not bother with this case on the ground that it involves merely "fact-bound error correction." Resp.Supp.Br.1. The numerous amicus briefs filed in support of certiorari and the national attention this case has attracted underscore the general importance of the questions presented. And, as explained, those

questions meet this Court's customary criteria for certiorari. But to be clear, the horrific circumstances underlying the questions presented by this capital case provide a compelling reason to *grant* certiorari, not deny it.[4]

---

[4] Alabama's suggestion (at 7) that a GVR would be a "waste [of] time and judicial resources" is based on its misreading of *Walker*, mischaracterization of the adequacy question presented, and failure to appreciate the role of the GVR. Pet.Supp.Br.10-11. And if a GVR were to lead to any "cutting-and-pasting" of *Walker* (Resp.Supp.Br.7) by the Eleventh Circuit on remand, it ought to be of this Court's admonishments that novel, unforeseen, and arbitrary rules are inadequate to bar review of federal claims.

CONCLUSION

For the foregoing reasons, and those in petitioners' previous submissions to this Court, the petition for certiorari should be granted and set for plenary review or, at a minimum, granted so that the decision below may be vacated and the case remanded for further consideration for the reasons herein.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
MAR 2 - 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS,
Acting Commissioner, Alabama Dept. of Corrections,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for
the Eleventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General

Corey L. Maze
Special Deputy Att'y General
*Counsel of Record

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
cmaze@ago.state.al.us

March 2, 2011

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF OF RESPONDENT 1

I. *Walker* Reaffirms That The First Question Presented Is Unworthy Of Certiorari Review. 2

II. A "GVR" To Consider *Walker* Would Be Pointless Because The Eleventh Circuit Applied the Same Standards That This Court Applied in *Walker* 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Beard v. Kindler,
558 U.S. ___ (2009) ..... *passim*

Lee v. Kimma,
534 U.S. 362 (2002) 2

Thornburg v. Abbott
490 U.S. 401 (1989) 2

Walker v. Martin,
562 U.S. ___ (2011) ..... *passim*

RULES

Rules of the Supreme Court 15.8 1

Rules of the Supreme Court 35.3 1

Ala. R. Crim. P. 32.1(f) 5

SUPPLEMENTAL BRIEF OF RESPONDENT[1]

The Court did not break any new ground in *Walker v. Martin*, 562 U.S. __, slip op. (Feb. 23, 2011). The Court simply, and unanimously, reversed the Ninth Circuit's misapplication of this Court's long-standing "firmly established and regularly followed" ("FERF") standard—the same pre-*Walker* standard that the Eleventh Circuit applied in this case. Pet. App. 9a-18a. Accordingly, Maples' petition remains what it always was: a call for fact-bound error correction that would affect only one State's rule (Alabama's) for one distinct moment in time (May 2003) to the benefit of one person (Maples). And because the Court's decision in *Walker* demonstrates that the Eleventh Circuit correctly applied the FERF standard to Maples' unique set of facts, not even Maples would benefit from the Court's certiorari review or a GVR. *See infra* 2-3; BIO 17-24.

Below, we address why none of Maples' supplemental arguments on the first question presented—*i.e.* whether the Eleventh Circuit correctly applied the FERF standard—warrants this Court's certiorari review or a GVR. We do not address Maples' rehashed arguments on the second question presented—*i.e.* whether Maples established sufficient "cause" to excuse his procedural default—because, as Maples admits, the second question "is not affected by *Walker*." Maples' Supp. Br. 6; *see* Rules of the Supreme Court 15.8 ("A supplemental brief shall be restricted to new matter.").

---

[1] Kim T. Thomas has replaced Richard F. Allen as the Commissioner of the Alabama Department of Corrections and should therefore be substituted as Respondent under Rule 35.3.

I. *WALKER* REAFFIRMS THAT THE FIRST QUESTION PRESENTED IS UNWORTHY OF CERTIORARI REVIEW.

Walker reaffirmed three principles in determining whether a State procedural rule is firmly established and regularly followed and is thus an adequate ground to preclude federal habeas review:

1. A State procedural rule can be FERF "even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Walker*, slip op. at 8 (quoting *Beard v. Kindler*, 558 U.S. ___, slip op. at 7 (2009));

2. "A discretionary rule ought not be disregarded automatically upon a showing of inconsistencies." *Walker*, slip op. at 11-12. This is especially true because "[c]loser inspection may reveal that seeming inconsistencies are not necessarily arbitrary or irrational." *Id.* at 11, n.7 (quoting *Thornburg v. Abbott*, 490 U.S. 401, 417, n.15 (1989) (ellipsis in original omitted)); and,

3. An otherwise FERF State procedural rule may nonetheless be deemed inadequate if either (a) the State courts engaged in a "persnickety application" of the rule in the present case, *Walker*, slip op. 8, n.4 (citing *Lee v. Kimma*, 534 U.S. 362 (2002) or (b) the State court exercised its discretion in a "surprising or unfair manner." *Id.* at 12.

In holding that Alabama's 42-day deadline was FERF, the Eleventh Circuit followed these long-standing rules. First, just like this Court in *Walker*, the court of appeals noted that the FERF requirement ensures that the State "has put litigants on notice of the rule" and that the rule "must not be applied in an arbitrary or unprecedented fashion." Pet. App. 11a. The court of appeals then noted, just as this Court did in *Walker*, that FERF "does not mean complete unanimity or absolute consistency of state decisions applying the rule." Pet. App. 12a. The court then spent the next four pages applying these standards—again, the same standards this Court applied in *Walker*—to conclude that "it was neither arbitrary nor inconsistent for the Alabama courts to enforce its 42 day rule for appeals and deny Maples' request for an out-of-time appeal, and that Alabama's appeal rules are adequate, independent state law procedural rules." Pet. App. 16a.

In other words, in *Walker*, this Court reaffirmed each of the principles that buttress the Eleventh Circuit's decision in this case. Granting certiorari review would simply force this Court to reaffirm and reapply the same general principles for the third time in two Terms (*Kindler*, *Walker*, and *Maples*).

As demonstrated below, each of Maples' arguments that *Walker* created or left open legal questions of national importance that should be answered by granting review of the first question presented are unavailing. *See* Maples' Supp. Br. 4-6, 8-9.

1. To avoid *Walker's* adverse application, Maples attempts to separate the FERF standards governing "the adequacy of *discretionary* rules" (the subjects in *Kindler* and *Walker*) from the standards governing "a particular mandatory state procedural rule," claiming that the latter is still an open question. Maples' Supp. Br. 5. But a mandatory/discretionary dichotomy is a distinction without a difference in Maples' case for two reasons.

First, assuming that Maples correctly casts Alabama's 42-day deadline and its procedure for requesting an out-of-time appeal as "mandatory," Maples offers no explanation why mandatory State rules should be governed by a different FERF standard than discretionary State rules. If anything, a published, mandatory rule should be subject to *less stringent* FERF review because the petitioner has clearly been put on notice of the rule and its consequences, which is, after all, the point of the FERF requirement. *See Kindler*, 558 U.S. ___, slip op. at 1 (Kennedy, J. concurring). Regardless, the outcome of this case would be the same whether this Court applied the same FERF standards for discretionary and mandatory State rules or the Court decided to adopt less stringent FERF standards for published, mandatory State rules (as logic seemingly dictates). Accordingly, Maples' argument fails to present the Court with an opportunity to clarify a nationally-compelling issue to the benefit of the Petitioner.

Second, labeling Alabama's filing deadline as "mandatory," without a modicum of discretion, contravenes Maples' FERF argument. Maples has

argued throughout that Alabama's 42-day filing deadline is not FERF because (a) Alabama Courts may grant tardy appellants an out-of-time appeal under Rule 32.1(f) of the Alabama Rules of Criminal Procedure and, (b) in Maples' opinion, the Alabama courts had no basis for denying his request for an out-of-time appeal when they had previously exercised their discretion to grant an out-of-time appeal in similar cases. *See* Pet. 13-18, Reply Br. 3-8. As we outlined in the BIO, Maples is wrong. The Alabama courts have exercised their discretion to grant out-of-time appeals when the failure to do so would result in a violation of due process, *see* BIO 20-23, a constitutional violation that Alabama and federal courts have correctly noted is not lurking in Maples' case because Maples' fault lay with post-conviction counsel, from whom he had no constitutional right to effective assistance. *See* Pet. App. 13a-16a (Eleventh Circuit); 53a-55a, 212a-215a (district court); 231a-234a (Alabama Court of Criminal Appeals).

Furthermore, even if the Alabama courts applied their discretion inconsistently between Maples' case and a similar case (and they did not), this Court closed the door on Maples' FERF argument in *Walker*. In *Walker*, the Ninth Circuit held that California's timeliness rule was not FERF "because outcomes under the rule vary from case to case." *Walker*, slip op. at 11. The Court unanimously rejected the Ninth Circuit's rationale, holding that "[a] discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies," *id.*, and reassuring that "we have no cause to discourage standards allowing courts to

exercise such discretion." *Id.* at 12. In other words, *Walker* answers Maples' first question to his detriment: Alabama's 42-day deadline is FERF, even if Maples can point to a case in which Alabama courts seemingly applied their discretion inconsistently when deciding whether to excuse a tardy appeal.

2. In two sentences, Maples recites the illusory circuit splits from his petition and claims that the "narrow issue in *Walker*" failed to address them. Maples' Supp. Br. 6 (citing Pet. 19-21). Of course, the Court did not resolve these alleged splits in *Walker* largely because they do not exist, as we explained at pages 28-29 of our BIO.

3. Maples concludes by arguing that certiorari review is especially warranted because "the arbitrary rules governing access to the federal courts established by the decision below are likely to impose unique hardships on habeas petitioners in Alabama." Maples' Supp. Br. 8-9. We assume that by "arbitrary rules," Maples is referring to the Eleventh Circuit's FERF standard. But, as outlined above, the Eleventh Circuit applied the same FERF standard as this Court in *Kindler* and *Walker*. So, application of the Eleventh Circuit's FERF rule imposes no more of a hardship in Alabama, Florida, or Georgia than the hardship bestowed by any Circuit that follows this Court's precedent.

In sum, Maples' first question offers nothing more than fact-bound error correction, to be judged against the same standards this Court has reaffirmed twice in the past two Terms. And, to top it off, *Walker*

demonstrated that the Eleventh Circuit not only applied the correct standards, it reached the right conclusion. *See* BIO 17-24.

II. A "GVR" TO CONSIDER *WALKER* WOULD BE POINTLESS BECAUSE THE ELEVENTH CIRCUIT APPLIED THE SAME STANDARDS THAT THIS COURT APPLIED IN *WALKER*.

Maples' alternative request for a GVR "to consider *Walker*" is a call to waste time and judicial resources. Maples' Supp. Br. 11. As outlined *supra* at 2-3, the Eleventh Circuit applied the same FERF standards that this Court reaffirmed in *Walker*. Accordingly, a remand for the court of appeals to reconsider its opinion in light of *Walker* would require little more than the lower court cutting-and-pasting quotes from *Walker* into its already-written opinion. Neither the result nor the court's rationale would change. Nor would Maples' FERF argument to this Court. Only the date on Maples' cert petition would be altered.

Neither of Maples' rationales for a GVR overcomes the obvious reason to deny his request.

1. Maples first claims that "the court below appeared to find that a state's inconsistent application of its procedural rules would *not* bar the adequacy of that rule, *see* Pet. App. 12a, effectively tracking [California's] suggestion in *Walker* that 'inconsistent application in the state's enforcement of its procedural rule in other cases is *immaterial* to adequacy.'" Maples' Supp. Br. at 10. Maples, however, crafts this "apparent finding" from whole

cloth. The Eleventh Circuit did not hold or state that inconsistent application of a State rule is irrelevant to the FERF analysis. Instead, the court stated on Pet. App. 12a (the page Maples cites) that the FERF requirement does not mandate "complete unanimity or absolute consistency of state decisions applying the rule," the same point this Court reiterated in *Walker*: "A discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies." *Walker*, slip op. at 12.

That the court of appeals appreciated and applied the "regularly followed" aspect of the FERF analysis is demonstrated by its four-page discussion of (a) the cases in which Alabama courts have excused a petitioner/appellant's failure to meet Alabama's 42-day deadline based on procedural due process concerns and (b) why Maples' case fails to raise the same concerns. *See* Pet. App. 13a-16a. If the lower court had truly found that inconsistent application by State courts is irrelevant to the FERF analysis, as Maples claims it did, then the court's extended discussion of Alabama cases was wholly unnecessary.

2. Maples next argues that the Eleventh Circuit held that he must provide a case with "*identical* facts" in order to disprove a State rule's FERF status, a holding that Maples claims is refuted by *Walker*. Maples' Supp. Br. at 10. But, again, the lower court levied no such "identical facts" requirement. The court merely stated that Maples failed to prove that Alabama's 42-day filing deadline was not FERF in part because "Maples can point to no Alabama case where an out-of-time appeal has been granted in circumstances such as his case," a

fair application of the FERF standard. Pet. App. 16a.

Like California courts, *see Walker*, slip op. at 10, Alabama appellate courts deny hundreds of untimely-filed appeals each year. *See* BIO 18 (demonstrating that the Alabama Court of Criminal Appeals dismisses nearly 400 appeals per year for missing the 42-day filing deadline at issue here). That Maples is in the same boat as hundreds of other appellants who violated Alabama's 42-day deadline, and that Maples cannot point to a single petitioner who was cast a preserver after falling out of the same boat, shows that Alabama "regularly follows" its 42-day filing deadline in the manner this Court contemplated in *Walker* and its predecessors. There is no reason to remand this case for the court of appeals to reach the same conclusion by applying the same FERF analysis a second time.

* * *

Try as he might, Maples cannot offer a single reason why the Court's decision in *Walker* increases the cert-worthiness of his case. The reason is simple: *Walker* changed nothing, at least not in Maples' favor. Maples' first question has always presented a claim of fact-bound error correction against the same FERF standards this Court has applied for decades. Maples' second question has no ties, whatsoever, to the *Walker* decision—not to mention that the second question was not raised below. *See* BIO 29-40.

If anything, *Walker* strengthens the Eleventh Circuit's opinion here. If California's filing deadline is considered "firmly established and regularly followed," despite having no fixed date and suffering from applications that "vary from case-to-case," *Walker*, slip op. at 11, then how can Alabama's codified 42-day deadline that is applied hundreds of times per year not be considered "firmly established and regularly followed"? Simply put, the Eleventh Circuit applied the correct FERF standards to reach the correct FERF conclusion. Neither review nor remand is warranted to affirm the lower court's correct result.

CONCLUSION

The Court should deny Maples' petition.

Respectfully submitted,

Luther Strange
Attorney General

John C. Neiman, Jr.
Solicitor General

Corey L. Maze
Special Deputy Att'y General
*Counsel of Record

Office of the Atty. General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
cmaze@ago.state.al.us

March 2, 2011

AMICUS CURIAE BRIEF

RECEIVED
[illegible]

No. 10-63

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

KIM T. THOMAS,
INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* ALABAMA APPELLATE COURT JUSTICES AND BAR PRESIDENTS IN SUPPORT OF PETITIONER

LISA W. BORDEN
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803
lborden@bakerdonelson.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT REGARDING INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. ALABAMA'S CAPITAL PUNISHMENT SYSTEM IS BROKEN, MAKING ADEQUATE POSTCONVICTION REVIEW INDISPENSABLE 4

A. Lack Of Qualified Counsel At All Stages 6

i. No Statewide Indigent Defense System 8

ii. Past And Current Fees Are Inadequate 12

iii. Many Appointed Attorneys Receive Inadequate Training, Or No Training At All, To Prepare For Capital Cases 14

B. Efforts To Reform Alabama's Capital Punishment System Have Not Succeeded 17

II. MANY OF THE INJUSTICES IN ALABAMA'S SYSTEM OF CAPITAL PUNISHMENT WERE ON DISPLAY IN MR. MAPLES' POSTCONVICTION PETITION 20

TABLE OF CONTENTS – Continued

Page

III. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT 29

A. Rule 32 Proceedings Are Difficult For Most Attorneys To Navigate, Let Alone *Pro Se* Petitioners; Lack Of Both Counsel And Proper Notice Can Be Fatal 29

B. Maples Was Left Unrepresented At A Critical Juncture 33

C. The State's Own Conduct Also Constituted Cause For Mr. Maples' Default 39

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

Barbour v. Allen, No. 06-10605 (May 10, 2007) 33, 34, 35

Coleman v. Thompson, 501 U.S. 722 (1991) 32

Culotta v. Mitchem, 2006 WL 752947 (M.D. Ala. 2006) 32

Dallas v. Haley, 228 F.Supp. 2d 1317 (M.D. Ala. 2002) 30

Ex Parte Jenkins, 972 So.2d 159 (Ala. 2005) 38

Gideon v. Wainwright, 372 U.S. 335 (1963) 19

Holland v. Florida, 2010 WL 2346549 37

Hyde v. State, 950 So.2d 344 (Ala. Crim. App. 2006) 12

Jamison v. Lockhart, 975 F.2d 1377 (8th Cir. 1992) 37

Jones v. Flowers, 547 U.S. 220 (2006) 40

Lockett v. Ohio, 438 U.S. 586 (1978) 28

Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000) 37

Marshall v. State, 884 So.2d 900 (Ala. 2003) 30, 31, 32

McFarland v. Scott, 512 U.S. 849 (1994) 14

Murray v. Carrier, 477 U.S. 478 (1986) 32

Murray v. Giarratano, 492 U.S. 1 (1989) 33

TABLE OF AUTHORITIES – Continued

Page

Palmer v. State, 842 So.2d 751 (Ala. Crim. App. 2002) 30

Porter v. State, 2 S.W.3d 73 (Ark. 1999) 38

Puckett v. State, 834 So.2d 676 (Miss. 2002) 37

Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (2004) 37

Williams v. State, 834 S.W.3d 464 (Tenn. 2001) 38

Woodson v. North Carolina, 428 U.S. 280 (1976) 28

STATUTES AND RULES

SUP. CT. R. 37.2(a) 1

SUP. CT. R. 37.6 1

ALA. CODE § 15-12-2(a)(1) (2007) 10

ALA. CODE § 15-12-2(a)(2) (2007) 10

ALA. CODE § 15-12-3 (2006) 10

ALA. CODE § 15-12-21 cmt. (2006) 12

ALA. CODE § 15-12-21(d) (2006) 12

ALA. CODE § 40-12-49 (2007) 13

ALA. R. JUD. ADMIN. 8(a) (2007) 10

ALA. R. CRIM. P. 32 ..... *passim*

ALA. CANON JUD. ETHICS 1 cmt. 25

TABLE OF AUTHORITIES – Continued

Page

ALABAMA LEGISLATIVE HISTORY

H.B. 280, 2010 Leg., Reg. Sess. (Ala. 2010).....17

H.B. 468, 2008 Leg., Reg. Sess. (Ala. 2008).....17

H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).....19

H.B. 764, 2000 Leg., Reg. Sess. (Ala. 2000).....18

S.B. 18, 92, 2004 Leg., Reg. Sess. (Ala. 2004) 17

S.B. 29, H.B. 432, 2006 Leg., Reg. Sess. (Ala. 2006).....17

S.B. 125, H.B. 189, 2007 Leg., Reg. Sess. (Ala. 2007).....17

S.B. 245, H.B. 319, 2011 Leg., Reg. Sess. (Ala. 2011).....17

S.B. 328, 2006 Leg., Reg. Sess. (Ala. 2006) 19

S.B. 371, 2005 Leg., Reg. Sess. (Ala. 2005) 17

OTHER AUTHORITIES

American Bar Association, ABA Death Penalty Representation Project 3 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/DPRP_Year_End_Brochure_2010.authcheckdam.pdf, last visited May 22, 2011.....38

TABLE OF AUTHORITIES – Continued

Page

American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report (June 2006) available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabaam/report.authcheckdam.pdf, last visited May 22, 2011 ..... *passim*

American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003) available at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf, visited August 9, 2010 ..... 13, 14, 15, 17, 28

American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Alabama (2005) available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html, last visited May 22, 2011 ..... 9, 10

American Bar Association, Ten Principles of a Public Defense Delivery System, February 2002, available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf, last visited May 22, 2011 7

TABLE OF AUTHORITIES – Continued

Page

American Civil Liberties Union, Broken Justice: The Death Penalty in Alabama (October 2005), available at www.aclualabama.org/whatwedo/brokenjustice_report.pdf, last visited May 22, 2011 ..... *passim*

Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991) 14

Committee to Re-Elect Judge Mike McCormick, BIRMINGHAM NEWS, November 4, 1994, at C4 (advertisement) 25

David A. Felice, *Justice Rationed: A Look At Alabama's Present Indigent Defense System With A Vision Towards Change*, 52 ALA. L. REV. 975 (2001) 11

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) 15

Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005 12

Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 CORNELL L. REV. 1079 (2006) 33

Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983) 14

TABLE OF AUTHORITIES – Continued

Page

Judge Learned Hand, Address at the 75th Anniversary of the Legal Aid Society of New York (Feb. 16, 1951), in Irving Dillard, *The Spirit of Liberty XIX* (1952) 11

Judicial Races In Several States Become Partisan Battlegrounds, NEW YORK TIMES, Oct. 24, 1994, available at http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html?_r=1&scp=5&sq=alabama+judicial+election&st=nyt, last visited May 20, 2011 25

Minutes of the Alabama State Bar Board of Commissioners Meeting, February 3, 2006, at 3-4 available at www.alabar.org/bbc/minutes/0203/bbc0203.pdf, last visited May 22, 2011 18

Minutes of the Alabama State Bar Board of Commissioners Meeting, July 15, 2006, at 2 available at www.alabar.org/bbc/minutes/0606/AM2006_July15_2006.pdf, last visited May 22, 2011 19

Our View: *Alabama Lawmakers Should Pass Legislation To Put A Three-Year Halt To Imposing Death Sentences Or Carrying Out Executions*, BIRMINGHAM NEWS, April 25, 2011, available at http://blog.al.com/birmingham-news-commentary/2011/04/our_view_alabama_lawmakers_sho_7.html, last visited May 22, 2011 18

TABLE OF AUTHORITIES – Continued

Page

Questions of Death Row Justice for Poor People in Alabama, NEW YORK TIMES, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-in alabama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt last visited May 20, 2011 ..... 13, 16

Ruth Friedman & Bryan Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992) 16

Scott Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929 (2006) 15

Steve Weinberg, Center for Public Integrity, *Breaking the Rules: Who Suffers When A Prosecutor Is Cited For Misconduct?* (2004) available at http://projects.publicintegrity.org/pm/default.aspx?act=main, last visited May 22, 2011 20

Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) 13

TABLE OF AUTHORITIES – Continued

Page

Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003) 9

Thomas Spencer, *EU Ambassador Hails Alabama's Evolving Image*, THE BIRMINGHAM NEWS, April 26, 2007 27

Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993) 14

William H. Pryor, Jr., *Letter to the Editor*, Nat'l. L.J., Jan. 12, 2004 35

STATEMENT REGARDING INTEREST OF *AMICI*[1]

The *amici* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Ernest Hornsby is a former Chief Justice of the Alabama Supreme Court and a former President of the Alabama State Bar. Ralph Cook is a former Justice of the Alabama Supreme Court. William Bowen is a former Presiding Judge of the Alabama Court of Criminal Appeals. William Clark and Robert Segall have previously served as Presidents of the Alabama State Bar. In the positions in which they served, each has had an exceptional opportunity to observe, participate in, and be affected by the administration of Alabama's system of capital post-conviction proceedings. The *amici* are perhaps better situated than any other party in this litigation to inform this Court concerning the state of the administration of the death penalty in Alabama. As a result of their participation in the process, they have a compelling interest in urging the Court to grant the

---

[1] Pursuant to Rule 37.2(a), SUP. CT. R., all parties have granted written consent for the filing of this Brief. Letters of consent have been submitted to the Clerk of Court. Pursuant to Rule 37.6, SUP. CT. R., the *amici* state that no person or entity, other than themselves and their counsel, authored any portion of this brief. The *amici* further state that no person or entity, other than themselves and their counsel, made any financial contribution toward the preparation and filing of this brief.

relief required to bring some measure of fairness to this procedure.

SUMMARY OF THE ARGUMENT

Alabama's capital punishment system is deeply flawed. Among many dire shortcomings of that system are its failure to adequately provide competent counsel for indigent defendants charged with capital offenses, either at trial or on direct appeal, and its heavy reliance for oversight on a necessarily inconsistent and sometimes biased hierarchy. As a result of these and other failures, many of the convictions and sentences rendered are inherently unreliable, and proper functioning of the postconviction review process is critical.

Many fundamental deficiencies of Alabama's capital punishment system were at issue in Mr. Maples' dismissed postconviction petition. From the overarching plague of ineffective assistance of counsel to allegations concerning prosecutorial misconduct, errors in the selection and instruction of jurors, and improper use of an aggravating circumstance, Mr. Maples presented a petition for postconviction review raising numerous instances of defects identified as substantial and widespread problems in Alabama's administration of death. All of his claims were summarily dismissed. Having been denied a full and fair postconviction review of those claims through no fault of his own, Mr. Maples now faces execution through a tragic combination of systematic injustice and arbitrary disregard.

Alabama's system of postconviction review in capital cases is exceedingly complex and rife with pitfalls – even attorneys and judges often must struggle to understand and comply with its procedures. Furthermore, Alabama stands alone in failing to provide counsel (or any legal assistance) for indigent death-sentenced inmates in postconviction proceedings. As a result, those who are fortunate enough to have attorneys must rely on pro bono counsel, most of whom practice far from Alabama. Although the *amici*, and many others, have made numerous efforts to reform the system, it remains a labyrinth in which many a hapless inmate has become hopelessly lost, sometimes through no fault of his own.

Petitioner is the victim of a combination of circumstances that clearly establish sufficient cause for his default. While Mr. Maples was represented by pro bono counsel at the time his Rule 32 petition was filed, those attorneys left their law firm and ceased representing Mr. Maples, but failed to withdraw or notify the court of substitute counsel. At that point, Mr. Maples became unrepresented, but continued to believe he was represented. Although the trial court initially denied the State's motion to dismiss, it conducted no further proceedings until it summarily denied his petition 18 months later. When the order denying Mr. Maples' petition finally was issued, the law firm's mailroom returned the two copies it received unopened. The clerk of court took no further action, and Mr. Maples himself was not notified of the order until well after his time for appeal had expired. Since Mr. Maples was unaware that he had been left

without legal representation, he is without fault for the missed deadline.

ARGUMENT

Undersigned *amici*, in our former capacities as Justices of the Alabama Supreme Court and Alabama Court of Criminal Appeals, and Presidents of the Alabama State Bar, have had first-hand experience with the practice and procedures surrounding the death penalty in Alabama, and are in a unique position to inform the United States Supreme Court of the state of that process in Alabama.

I. ALABAMA'S CAPITAL PUNISHMENT SYSTEM IS BROKEN, MAKING ADEQUATE POSTCONVICTION REVIEW INDISPENSABLE.

The complexities and pitfalls of the capital postconviction process in Alabama cannot be overstated nor can the importance of the proper functioning of that process, particularly as applied to indigent defense. Alabama's death penalty processes in general, and its "system" of providing representation for indigent defendants during trial and direct appeals in particular, are deeply flawed. As a consequence, many verdicts and sentences are inherently unreliable, making adequate postconviction review crucial.

The myriad deficiencies in Alabama's administration of the death penalty have been well-documented, independently of the facts and competing interests

inherent in any particular case. In 2003, the American Bar Association's Section of Individual Rights and Responsibilities established teams to assess death penalty systems in sixteen jurisdictions, including Alabama. The Alabama Assessment team was made up of eight Alabamians, including defense attorneys experienced in capital litigation,[2] a state legislator, a district attorney, a law professor, and the dean of a law school. It undertook an exhaustive study and, in June 2006, issued an Assessment Report containing conclusions and recommendations concerning numerous failings of constitutional proportion in Alabama's capital punishment system.[3] A 2005 report by the *American Civil Liberties Union*, *Broken Justice: The Death Penalty in Alabama* (October 2005) ("*Broken Justice*"), similarly documented many glaring deficiencies in what passes for justice in the State's imposition of death.[4]

The Assessment Report detailed the analysis of key aspects of Alabama's death penalty administration, from defense services, jury instructions and

---

[2] William N. Clark, one of *amici*, was a member of the assessment team.

[3] *American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) ("*Assessment Report*"), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf, last visited May 22, 2011.

[4] *Broken Justice*, available at www.aclualabama.org/whatwedo/brokenjustice_report.pdf, last visited May 22, 2011.

judicial independence to treatment of racial and ethnic minorities and those with mental illness and developmental disabilities. In numerous respects, the Assessment Report rightly concluded that Alabama "cannot ensure . . . fairness and accuracy" in cases in which death is sought or imposed,[5] and joined "over 450 other organizations, religious institutions, newspapers, and city/town/county councils" in calling for a moratorium on executions until the plethora of injustices it identified could be addressed.[6]

Not surprisingly, this call went unheeded, as have most recommendations contained in the document. Multiple failings in fundamental areas identified as needing significant reform leave us with a complete lack of confidence in the death penalty system, and in its results.

A. Lack Of Qualified Counsel At All Stages.

While studies have identified numerous significant defects in Alabama's capital punishment system, all are magnified by the most glaring defect – the dearth of qualified counsel at all stages of the process. Of the ABA's ten principles for the provision of indigent defense, Alabama's "system," to the extent it has one, miserably fails to satisfy most, including (of particular relevance here):

---

[5] *Assessment Report* at vi.

[6] *Id.*

> Defense counsel's ability, training and experience match the complexity of the case.
>
> There is parity between defense counsel and the prosecution with respect to resources. . . .
>
> Defense counsel is provided with and required to attend continuing legal education.
>
> Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.[7]

Over the course of decades, numerous efforts have been made to ensure that indigents sentenced to death receive representation by qualified counsel. All have been defeated by indifference or outright opposition.

The indispensability of representation at the post-conviction stage must be understood against the backdrop of a compromised system of representation at the trial level. In the majority of counties, attorneys are appointed to represent capital defendants, but there are only two requirements of appointed counsel. They must be licensed members of the Alabama Bar and have five years of criminal experience. The requirement for experience in criminal law makes no distinction as to the kinds of cases handled. "An attorney

---

[7] *American Bar Association, Ten Principles of a Public Defense Delivery System*, February 2002, available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf, last visited May 22, 2011.

who spends five years representing defendants facing minor criminal charges such as shoplifting or trespassing will satisfy Alabama's capital counsel requirement."[8] Alabama does not require any special training *at all* for attorneys appointed to represent indigent defendants. As a result, many are not skilled in the complex demands of a capital trial. In addition, many current death row inmates were convicted when the state imposed *grossly inadequate* compensation caps on appointed counsel. Each of these weaknesses viewed in isolation may not sound the alarm bells but together they make adequate postconviction review critically important, because the trial process produces unreliable verdicts and sentences:

> [Alabama's] patchwork indigent defense system, combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable.[9]

i. No Statewide Indigent Defense System.

Despite the efforts of many, there is no statewide indigent defense system in Alabama. Each of forty-one judicial circuits is left to create its own system for

---

[8] *Broken Justice* 5.

[9] *Assessment Report* at iii.

providing counsel to indigent defendants. Funding is generated through the Fair Trial Tax, but there is no statewide oversight of indigent defense spending. The circuits employ one of three general methods: public defender offices, court appointment, or contract defenders.

Only four have a centralized public defenders office; *only one* of those offices represents capital defendants. This means that capital defendants in only one judicial circuit have public defenders as appointed counsel. Ten circuits contract with attorneys for a set monthly fee regardless of the volume of cases. *Assessment Report* at 99. An American Bar Association ("ABA") Committee found that "contract defenders in Alabama provide constitutionally inadequate representation by 'basically doing nothing' but processing defendants to a guilty plea in as expeditious a manner as possible."[10] An Alabama Appleseed Center review of four circuits' contract defender systems found that "the attorney of record did not file any motions in 72% of the capital and non-capital felony cases."[11]

---

[10] *Assessment Report* at 119, *citing American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Alabama* (2005) [hereinafter, "*Standing Committee*"], available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html, last visited May 22, 2011.

[11] *Id.*, *citing* Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003).

The most common method, utilized by twenty-seven circuits, is for the judge to appoint an attorney for an hourly fee set by statute. *Id.* at 100. The appointment system raises concerns about judicial independence:

> Compounding the difficulties that go along with maintaining such a diffuse indigent defense system is the fact that '[t]he state's indigent defense systems are not fully independent from undue political and judicial influence."[12] Elected judges are responsible for deciding upon the type of indigent defense system each judicial circuit will use. . . .[13] Furthermore, in the twenty-seven judicial circuits that use court-appointment systems, judges are responsible for making appointments in individual cases. ***All of this highlights the reality that the State of Alabama's indigent defense system not only fails to be independent of the judiciary, but is wholly dependent on it.***[14]

As previously noted, Alabama law leaves trial judges free to appoint attorneys who lack even a modicum of experience in handling capital cases, and who are not required to engage in any training or other preparation for the life or death task at hand.

---

[12] *Assessment Report* at 121 (*citing Standing Committee*).

[13] ALA. CODE § 15-12-2(a)(1) (2007); ALA. CODE § 15-12-2(a)(2) (2007); ALA. CODE § 15-12-3 (2006); ALA. R. JUD. ADMIN. 8(a) (2007).

[14] *Assessment Report* at 121 [emphasis added].

Available data suggests that the difference in performance between counsel appointed for indigent defendants and those retained by defendants with more resources is striking. According to an analysis published in the Alabama Law Review,[15] "over half the time indigent defendants appear before a tribunal for a decision which will affect their liberty rights, what transpires is unfavorable for the defendant," while those with retained counsel fare much better. In 1998, the analysis revealed, appointed counsel obtained unfavorable results more than 62% of the time.[16] Little wonder that more than 95% of those occupying Alabama's death row are indigent.[17] The fact that poor people must assume a much higher risk of conviction in Alabama as a result of receiving lesser representation is certainly, in our view, violative of Judge Learned Hand's admonition that "thou shalt not ration justice."[18]

---

[15] David A. Felice, *Justice Rationed: A Look At Alabama's Present Indigent Defense System With A Vision Towards Change*, 52 ALA. L. REV. 975 (2001).

[16] *Id.* at 997.

[17] *Broken Justice* at 1.

[18] Judge Learned Hand, Address at the 75th Anniversary of the Legal Aid Society of New York (Feb. 16, 1951), in Irving Dillard, The Spirit of Liberty XIX (1952).

ii. Past And Current Fees Are Inadequate.

Further rationing of justice in Alabama occurs because appointed counsel in capital cases are not adequately compensated for the prodigious task before them. Prior to 1999, appointed attorneys were compensated at $40 an hour for time in court and $20 per hour for work outside the courtroom, ALA. CODE § 15-12-21 cmt. (2006), and "could not be compensated more than $1000 for out-of-court work for each phase of the capital trial." *Hyde v. State*, 950 So.2d 344, 359-60 (Ala. Crim. App. 2006). In 1999 (too late to benefit Mr. Maples), the Alabama legislature "remove[d] the cap on the total fee an attorney representing an indigent defendant could recover." *Id.* at 359. It also raised the in-court rate to $60 per hour, and the out-of-court rate to $40 per hour, still a pittance compared with what counsel could charge a paying client. ALA. CODE § 15-12-21(d) (2006). But, according to a June 2006 ABA report, 70% of Alabama death row inmates were convicted when defense lawyers were limited to $1000 for out-of-court work.[19] Moreover, "[j]udges routinely do not pay lawyers the entire bill for work done in the case. One lawyer said the court paid him the equivalent of $4.98 per hour to defend his client's life."[20] Given the $1000 cap extant at the time of most of Alabama's death row convictions, including Mr. Maples', a defense attorney who

---

[19] *See Assessment Report* at 126 (*citing* Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005).

[20] *Broken Justice* at 2.

expended the hours required to provide competent representation could reasonably expect to be paid $5 per hour or less. In an interview, the same lawyer declared that he would go to jail before handling another capital case.[21]

The demands on counsel representing indigent defendants in capital cases are significantly more time consuming than a typical felony criminal trial. "[R]ecent studies indicate that ***several thousand hours are typically required to provide appropriate representation***. An in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889."[22] Counsel representing those inmates in Alabama either had to foot the bill themselves after reaching the cap, or stop vigorously defending their clients. Many attorneys cannot afford to handle capital trials.

---

[21] *Questions of Death Row Justice for Poor People in Alabama*, NEW YORK TIMES, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-inalbama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt, last visited May 20, 2011.

[22] *American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003), *citing* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 14 (1998) [emphasis added].

Once compensation reached the limits, many likely dedicated their attentions to income producing work. We do not mean to suggest that this is due to laziness or some other unjustified reason; rather, it is caused by the sheer financial constraints imposed by the system. A law office cannot be run for free.

iii. Many Appointed Attorneys Receive Inadequate Training, Or No Training At All, To Prepare For Capital Cases.

Death penalty cases require a repertoire of knowledge unique to the capital context, and "have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases."[23]

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the

---

[23] *ABA Guidelines* at 3, *citing McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence); *see also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

> law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[24]

One author described the demands of trying a capital case as "the legal equivalent of neurosurgery."[25] Given the high degree of specialization required, it is critically important that those appointed to represent the indigent be adequately skilled and trained. According to the ABA Guidelines, "the defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,[26] an investigator, and a mitigation specialist." *ABA Guidelines* at 28.

Alabama requires no additional training for lawyers in death penalty cases beyond the twelve hours of CLE per year to maintain state bar licensure. ALA. CODE § 40-12-49 (2007). No training in capital defense is required. This has created a system where "capital defendants are often represented by attorneys who are unfamiliar with death penalty litigation, do not

---

[24] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995).

[25] Scott Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1945 (2006).

[26] The *ABA Guidelines* indicate that attorneys appointed to represent a defendant in a capital case should have received substantial training in the conduct of capital representation.

know how to prepare or present a capital case, and make numerous avoidable mistakes during the course of a trial."[27] In addition, "[n]o independent entity within the State of Alabama is responsible for drafting or publishing a roster of certified trial and appellate attorneys or for monitoring, investigating, and maintaining records concerning the performance of all attorneys handling death penalty cases." *Assessment Report* 124.

We are saddened that the circumstances surrounding the representation of the poor in our state caused the leader of the ABA's Death Penalty Representation Project to declare that "Alabama is our top priority. . . . The need for competent lawyers there is desperate."[28] These desperate inadequacies of legal representation at trial form a necessary backdrop to fully understanding the crisis at the postconviction stage.

---

[27] Ruth Friedman & Bryan Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 5 (1992).

[28] *Questions of Death Row Justice for Poor People in Alabama*, NEW YORK TIMES, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-in-Alabama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt, last visited May 20, 2011.

B. Efforts To Reform Alabama's Capital Punishment System Have Not Succeeded.

Over the years, the Alabama State Bar has made recommendations for improvement of indigent defense,[29] and numerous bills to ensure counsel have been introduced in the Alabama legislature, many with our active support, but without success. Bills calling for a moratorium on executions, during which procedures would be implemented to ensure that the death penalty is administered fairly, were introduced over the last several years. *See, e.g.*, S.B. 18, 92, 2004 Leg., Reg. Sess. (Ala. 2004); S.B. 371, 2005 Leg., Reg. Sess. (Ala. 2005); S.B. 29, H.B. 432, 2006 Leg., Reg. Sess. (Ala. 2006); S.B. 125, H.B. 189, 2007 Leg., Reg. Sess. (Ala. 2007); H.B. 468, 2008 Leg., Reg. Sess. (Ala. 2008); H.B. 280, 2010 Leg., Reg. Sess. (Ala. 2010); S.B. 245, H.B. 319, 2011 Leg., Reg. Sess. (Ala. 2011). If adopted, that legislation would have required implementation of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[30] as well as additional due process protections in post-conviction proceedings. *Id.* While evidence mounts that the system doesn't work, and that innocent people

---

[29] William Clark, one of the *amici*, was appointed to a State Bar advisory committee on indigent defense in 1975.

[30] *American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003) [hereinafter, "*ABA Guidelines*"], available at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf, visited August 9, 2010.

may be put to death as a result, it seems that the chances for a moratorium are actually dwindling. As recently as April 2011, the editor of the Birmingham News lamented that "legislation to address flaws in Alabama's death penalty seems to be even more lifeless than usual."[31]

Former Presidents of the Alabama State Bar and Judges of the State's appellate courts, including some of the *amici*, have actively promoted legislation to provide representation for the indigent in postconviction litigation. House Bill 764, introduced in March 2000, would have created an "Office of the Alabama Appellate Defender" to provide representation to the indigent in capital cases in which the death penalty had been imposed. H.B. 764, 2000 Leg., Reg. Sess., (Ala. 2000). It was never adopted. A later measure would have created an Indigent Defense Commission. Drafted by a task force appointed by then-Chief Justice Drayton Nabors and headed by Retired Associate Justice Gorman Houston,[32] it provided for appointment of

---

[31] *Our View: Alabama Lawmakers Should Pass Legislation To Put A Three-Year Halt To Imposing Death Sentences Or Carrying Out Executions*, BIRMINGHAM NEWS, April 25, 2011, available at http://blog.al.com/birmingham-news-commentary/2011/04/our_view_alabama_lawmakers_sho_7.html, last visited May 22, 2011.

[32] The task force consisted of four judges and nine lawyers, including representatives from the Alabama Attorney General's office, and criminal defense attorneys. *See Minutes of the Alabama State Bar Board of Commissioners Meeting*, February 3, 2006, at 3-4 (available at www.alabar.org/bbc/minutes/0203/bbc0203.pdf, visited May 22, 2011). William Clark, one of the *amici*, was a member.

counsel for indigent persons in postconviction proceedings and established minimum standards for experience, training, and qualifications of such counsel. The legislation was introduced in 2006 (S.B. 328, 2006 Leg., Reg. Sess. (Ala. 2006)), but failed to pass. *See Minutes of the Alabama State Bar Board of Commissioners Meeting*, July 15, 2006, at 2,[33] *see also*, H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).

These are but a few examples of many failed efforts to bring significant reform to Alabama's capital punishment processes. In the absence of such vitally needed reforms, Alabama falls far short of providing the basic fairness to its poor that is constitutionally required, and that we must demand. As this Court recognized in *Gideon v. Wainwright*,

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[34]

Neither can it be realized if the poor man is permitted only the grossly underfunded services of the inexperienced and the incompetent.

---

[33] Available at www.alabar.org/bbc/minutes/0606/AM2006_July15_2006.pdf, visited May 22, 2011.

[34] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

II. MANY OF THE INJUSTICES IN ALABAMA'S SYSTEM OF CAPITAL PUNISHMENT WERE ON DISPLAY IN MR. MAPLES' POSTCONVICTION PETITION.

It was into this woefully deficient and unjust system that Mr. Maples was thrust – his trial occurred in 1997 – and many fundamental deficiencies addressed in the Assessment Report were at issue in his summarily dismissed Rule 32 petition. *Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Civil Procedure ("Petition").* While these deficiencies were far from being unique to Mr. Maples' case, failure to fairly address them in the postconviction process will have a direct and deadly impact upon him.

Mr. Maples' postconviction petition alleged several instances of prosecutorial misconduct. Joint Appendix 126-28.[35] Prosecutorial misconduct is a stark reality and a "major problem"[36] in the criminal justice system, both nationally and in Alabama: "Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases."[37] In Alabama alone, there were 325

---

[35] The Joint Appendix is hereinafter cited as "J.A."

[36] *Broken Justice* at 14.

[37] *Assessment Report* at 75, *citing* Steve Weinberg, Center for Public Integrity, *Breaking the Rules: Who Suffers When A*

(Continued on following page)

allegations of misconduct in criminal cases during that period, and decisions were reversed or remanded in 69 of those cases.[38]

Mr. Maples' postconviction petition alleged that the district attorney committed numerous acts of misconduct, including improper arguments at both the guilt and penalty phases of the trial. The prosecution's arguments contained statements about the D.A.'s personal belief in Mr. Maples' guilt, comments on his decision not to testify, encouragement to the jurors to "send a message" by sentencing him to death, and an assertion that the victim's family wanted a death sentence. *See Petition*, J.A. 77-78, 112-14. As noted in the Assessment Report, the Alabama Court of Criminal Appeals has held arguments such as these to be improper in many other cases.[39] This extinguished claim of Mr. Maples' is likely meritorious, and is but a glaring example of an all too common problem in Alabama.

Mr. Maples also alleged that the prosecution improperly relied upon an aggravating circumstance without giving statutorily required notice. *Petition*, J.A. 75-76, 114-15. The aggravator at issue was that "the capital offense was especially heinous, atrocious

---

Prosecutor Is Cited For Misconduct? (2004), available at http://projects.publicintegrity.org/pm/default.aspx?act=main, last visited May 22, 2011.

[38] *Broken Justice* at 14.

[39] *Assessment Report* at 86-87, 200.

or cruel compared to other capital offenses." *Petition*, J.A. 114. It is troubling that reliance on this factor was allegedly done without proper notice. However, even absent this complication, Alabama's application of this aggravator has been frequently identified as a significant deficiency. The ABA's Alabama assessment team found that the statutory language:

> has not been interpreted in a manner that provides a basis for distinguishing between those cases in which the death penalty is properly applied and those cases in which the death penalty is not. Because Alabama courts have not systematically reviewed cases involving this aggravating circumstance, and have thus failed to fully enforce the statutory requirement that prosecutors establish the comparative atrocity of a given capital murder as compared to other capital murders, this aggravating factor is not subject to any meaningful or rational limitation. It thus has the potential to be improperly used as a mere catch-all provision.[40]

Indeed, the "especially heinous, atrocious or cruel" aggravator appears to be thrown in as a blanket factor in many capital cases. In our experience, it would be rare to find a case in which the prosecution actually presented evidence that would allow the fact-finder to compare the circumstances of the crime to those in other cases. Instead, this aggravating factor is

---

[40] *Assessment Report* at v.

typically supported merely by the prosecution's forceful use of graphic language to describe the crime at hand. Given nothing else for comparison, a typical jury of laypersons will easily find that most any murder satisfies the requirement.

Mr. Maples' postconviction petition contained numerous allegations concerning improper selection and instruction of jurors. Once again, his allegations went directly to deficiencies in Alabama's capital punishment system identified by independent sources.

Mr. Maples alleged that the trial court erroneously failed to excuse for cause jurors who indicated they would automatically vote for death in the event of a conviction, *Petition*, J.A. 49-50, 129-30, and did excuse jurors who expressed doubts about the death penalty. *Petition*, J.A. 49. Jurors may be disqualified from service for probable prejudice, which includes their support for (or opposition to) the death penalty.[41]

The petition asserts that the trial court also erroneously failed to excuse a juror who was personally acquainted with a witness. *Petition*, J.A. 134. It also includes allegations concerning failure to conduct individual *voir dire* and statements made by some prospective jurors during group *voir dire* that were likely to have prejudiced others. *Petition*, J.A. 65-66. In addition, it alleged instances of juror misconduct and improper juror communications. *Petition*, J.A. 130-34.

---

[41] *Assessment Report* at 178-79.

The petition asserts that improper instructions were given to the jury concerning the burden of proof and the finding of aggravating and mitigating factors, and that the jury was given improper verdict forms. *Petition*, J.A. 52-53, 121-22, 137-39. The Assessment Report concluded that juror confusion over their roles and responsibilities, whether and how to consider mitigating and aggravating factors and burdens of proof suggests "jurors are recommending death based on serious legal errors."[42] These deficiencies may very well have substantially affected Mr. Maples' case.

Mr. Maples would not have been sentenced to death had Alabama followed another policy that was a key recommendation of the ABA's assessment team by requiring that jurors be unanimous in recommending death.[43] Two of Mr. Maples' twelve jurors voted for life.

Lack of judicial independence in Alabama's administration of the death penalty also is a significant concern here. All of Alabama's state court judges are chosen through partisan elections, and those interested in being re-elected face fierce pressure to present a "tough on crime" reputation. Partisan judicial elections operate in tension with core principles of an independent judiciary: that a judge ought to behave with "probity, fairness, honesty, uprightness,

---

[42] *Assessment Report* at v.

[43] *Assessment Report* at vi.

and soundness of character,"[44] without regard to "inappropriate outside influences."[45] Such influences lead many to publicly trumpet hard-line credentials. One judge's campaign ad declared: "some think he's too tough on criminals, AND HE IS . . . We need him now more than ever." Committee to Re-Elect Judge Mike McCormick, BIRMINGHAM NEWS, November 4, 1994, at C4 (advertisement). In many Alabama judicial races, candidates' positions on the death penalty loom large as a hot button issue:

> "Everybody now understands that you can't talk too much about tort reform," said Bryan Stevenson, the executive director of Equal Justice Initiative of Alabama, a nonprofit law firm that represents poor people and prisoners, "The big business folks will run a candidate, but the candidate talks about how he wants to execute a bunch of folks or how he's for the Ten Commandments."[46]

That the need to campaign on being more of a "hanging judge" than the next guy can result in significant bias problems was recognized by the ABA when it recommended that Alabama take steps to examine and address the fairness of its judicial

---

[44] ALA. CANON JUD. ETHICS 1 cmt.

[45] *Id.*

[46] *Judicial Races In Several States Become Partisan Battlegrounds*, NEW YORK TIMES, Oct. 24, 1994, available at http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html?_r=1&scp=5&sq=alabama+judicial+election&st=nyt, last visited May 20, 2011.

election system, which had been "called into question," and eliminate the ability of judges to override a jury's recommendation of life imprisonment and impose death instead:

> Alabama is the only state with such override that selects its judges in partisan elections. This combination can cause bias or the appearance of bias. For example, 90% of overrides in Alabama are used to impose sentences of death, but in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life.

The potential for bias in the imposition of death in Alabama doesn't first arise at sentencing – the appetite of elected prosecutors for bringing capital charges is just as problematic. Morgan County, where Mr. Maples was convicted, has a higher percentage of Alabama's death penalty cases than it has of Alabama's population, or of its murders.[47]

The foregoing failings in the conduct of Mr. Maples' trial[48] would have been greatly amplified by the overarching concern of lack of qualified and competent counsel – for without qualified and competent counsel these errors went unnoticed at trial. The significance of such claims cannot be overstated.

---

[47] *Broken Justice* at 3, Table 2.

[48] Other failings also asserted in the petition are not discussed here.

In 2005, while Mr. Maples' appeal of the dismissal of his postconviction claims was making its way through the appellate courts, Alabama sentenced more people to death than Georgia, Mississippi, Louisiana and Tennessee combined.[49] None can disagree with the ABA's assessment that "defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty."[50]

Mr. Maples' postconviction claims contained numerous allegations of ineffective assistance of counsel, many of which mirror concerns raised in the Assessment Report and other studies. Among these are counsel's failure to make vital objections to the instances of judicial error and prosecutorial misconduct cited above. Mr. Maples also asserted that trial counsel made damning admissions concerning elements of the offense, including the element of intent, failed to pursue and present a crucial defense, failed to request important jury instructions, failed to request and use the assistance of experts, submitted verdict forms inconsistent with defense strategy, and failed to adequately investigate and present available evidence of mitigating circumstances. *Petition*, J.A. 32-33, 35-40, 58-62, 85-102. These failures by trial counsel, who admittedly were "stumbling around in

---

[49] Thomas Spencer, *EU Ambassador Hails Alabama's Evolving Image*, THE BIRMINGHAM NEWS, Thursday, April 26, 2007.

[50] *Assessment Report* at 97.

the dark," are directly related to Alabama's own failure to provide for representation of indigent defendants by qualified, competent and adequately compensated counsel.

At the time of Mr. Maples' trial, Alabama law provided for court-appointed attorneys in capital cases to be paid no more than $1000 for out-of-court work for each phase of the case, at a rate of $20 per hour (a total of 50 hours). Accordingly, in order to properly prepare for trial, Mr. Maples' counsel would have needed to spend hundreds of additional hours working for free.

It is entirely possible that Mr. Maples' counsel did not understand the substantial time and effort required to effectively represent him at trial. Shockingly, Mr. Maples asserts that "neither of [his] trial counsel had ***ever*** conducted a second stage in a capital trial."[51] Not having done so, trial counsel failed to meet minimum standards for investigation of mitigation evidence by failing to adequately discover, develop and present a wealth of available evidence concerning his family and social history, medical and educational background, and other aspects of his life that should have been considered in mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *see also ABA Guidelines* at 11.4.1(A)(2)(c).

---

[51] J.A. 55, 85-86.

III. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT.

Where the inmate, through no fault of his own, suffers a complete failure of representation and does not receive notice of an order to be appealed, he is rendered completely unable to comply with the deadline for appeal. It is undisputed that Mr. Maples was not notified by anyone that his petition had been denied until after the time for appeal expired. Since Mr. Maples quite understandably believed his counsel would receive notice of any order and notify him of it, he could not be expected to personally monitor the status of his case. That is an arduous task, at best, for the incarcerated, but at least those who know they have no attorney are aware that they must undertake it. Under these circumstances, Mr. Maples cannot be held responsible for failure to appeal an order of which he had no knowledge.

A. Rule 32 Proceedings Are Difficult For Most Attorneys To Navigate, Let Alone *Pro Se* Petitioners; Lack Of Both Counsel And Proper Notice Can Be Fatal.

Alabama's postconviction process is governed by exceptionally complex procedural rules, unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate the maze. These rules are so complex, and often so unyielding, that an inmate who is not represented by competent counsel has little chance of survival. The postconviction process is so complex that even attorneys and

judges often struggle to understand its nuances and the inability of an unrepresented inmate to comply with procedural requirements results in potentially meritorious claims being barred. *See, e.g., Dallas v. Haley*, 228 F.Supp. 2d 1317, 1320 (M.D. Ala. 2002) ("[S]uffice it to say that the issue of whether Dallas' habeas petition was timely filed is a very complex question which turns on whether a certain Alabama procedural rule was firmly established and regularly followed. As mentioned above, this issue is complicated enough that the magistrate judge asked the parties to rebrief it").

If the petitioner manages to file a timely petition, and his petition is denied, he has to know that a ruling has occurred. He also has to know that he has a right to appeal, of which the court is not required to inform him. *Palmer v. State*, 842 So.2d 751, 752 (Ala. Crim. App. 2002). At this critical juncture, the assistance of competent counsel is imperative. In his dissenting opinion in *Marshall v. State*, 884 So.2d 900 (Ala. 2003), former Alabama Supreme Court Justice Douglas Johnstone provided an illuminating account of why this is so:

> [C]ommonly in this state, a trial court will deny a convict's Rule 32, Ala. R.Crim. P., petition but will not notify the convict of the denial and the convict will not receive word of the denial until after his time to appeal the denial has expired. The convict typically cannot know when to expect a ruling, since trial judges sometimes deny such petitions immediately upon receipt, sometimes withhold

> rulings for weeks, months, or years, sometimes conduct hearings before ruling, and sometimes deny the petitions without a hearing. For all of the sanctimonious talk of the courts about a petitioner's duty to monitor the status of his Rule 32 petition, any notion that each of these poor devils can periodically obtain reliable information on whether the trial court has ruled, is stark fiction. If the convict is incarcerated, he is even more helpless to learn of any ruling.

Id. at 905-06 (Johnstone, J., dissenting).

These difficulties were compounded in Mr. Maples' case by at least two other recognized deficiencies in Alabama's arcane postconviction process. The trial court denied the State's motion to dismiss in December 2001, then proceeded to do nothing with respect to Mr. Maples' requests for discovery. For the next year and a half, nothing happened in the case at all. Then, the trial court summarily dismissed Mr. Maples' claims without having given him a hearing, or even an opportunity to develop his claims through discovery. Alabama's "procedures for summary disposal of post-conviction claims and no requirement that an evidentiary hearing be held inhibit full judicial consideration of all claims. . . ."[52] This sequence of events contributed to Mr. Maples failing to receive timely notice. After receiving an order denying the motion to dismiss his petition, both Mr. Maples and

---

[52] *Assessment Report* at 155.

his then-counsel would have fairly assumed that the court would eventually rule on pending requests for discovery. Had the trial court done so, the activity in the case likely would have prompted other attorneys to enter appearances for Mr. Maples. Instead, during the 18 month lull, Mr. Maples' attorneys wandered off, leaving him completely unprotected.

Despite the recognition in *Marshall* that indigent inmates lack the ability to adequately understand, interpret, and act upon the complex procedural and substantive obstacles they must negotiate in seeking postconviction relief, the courts grant no dispensation from those requirements to the unrepresented. To establish cause to excuse a procedural default, a petitioner must demonstrate that the default resulted from some objective impediment that prevented him from properly raising the claim, and that cannot be attributed to his own conduct. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The fact that the inmate was proceeding *pro se* when the default occurred generally does not excuse the default. *E.g.*, *Culotta v. Mitchem*, 2006 WL 752947 (M.D. Ala. 2006), *citing Coleman v. Thompson*, 501 U.S. 722 (1991). However where, as here, the inmate's counsel abandoned their representation of him without notice, leaving him unwittingly a *pro se* petitioner, it simply cannot be the case that our courts lay the default at his cell door.

B. Maples Was Left Unrepresented At A Critical Juncture.

Since this Court's decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), there has been a "virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings."[53] Most state legislatures recognize the critical role postconviction counsel serve in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners, leaving indigent inmates to either fare for themselves or rely upon volunteer assistance in those increasingly rare instances when pro bono counsel is available.

Today most of our death-sentenced indigents who are fortunate enough to have counsel in postconviction proceedings are forced to rely upon volunteers, the vast majority of whom, like Mr. Maples' counsel, reside in states far from Alabama. It is not by happenstance that this situation exists – Alabama forthrightly admits that, rather than provide for adequate postconviction counsel, it has chosen "to rely on the efforts of typically well-funded out-of-state volunteers." Brief in Opposition 23, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). If these volunteers are "well-funded," it is because they choose to donate

---

[53] Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 CORNELL L. REV. 1079, 1094 (2006).

their own resources in an effort to make up for some small portion of what Alabama denies its own poor.

Given that the "system" of reliance upon pro bono counsel exists of Alabama's own volition, the convoluted labyrinth of procedures through which the inmate must pass in these circumstances, and the severity of the consequences he will suffer for any failure to do so correctly, it is absolutely imperative that counsel in whose hands the inmate has placed his life not abandon their post. And it is absolutely unacceptable that the State should be permitted to play a game of "gotcha" with the inmate's life hanging in the balance.[54] In Mr. Maples' case, through no fault of his own, both of these events occurred with deadly consequence.

As the State of Alabama noted in its brief to this Court in *Barbour v. Allen*, most lawyers providing pro bono assistance to indigent death-sentenced inmates in Alabama are operating at a significant distance, most often practicing in large law firms located in

---

[54] The Attorney General's office contacted Mr. Maples directly *after* his time for appeal expired and advised him that his petition had been dismissed and his time to file a federal *habeas* petition would soon expire as well. Pet. App.253a. ("Pet. App." refers to the Appendix to the Petition for Writ of Certoriari submitted by the Petitioner in this case.) Although the State contended before the Alabama Supreme Court that Maples could "still present his postconviction claims" in federal court, App.18a., it then asserted to the federal court that Maples had defaulted on his claims of ineffective assistance of counsel due to his failure to file a timely appeal.

major northeastern cities. Br. in Opp. at 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).[85] The valiant efforts of the many out-of-state attorneys who, over the years, have stepped into the regrettable void must not be undervalued. It is neither surprising nor unusual that Mr. Maples placed his fate in the hands of pro bono counsel from another state. The attorneys who agreed to represent Mr. Maples on a pro bono basis practiced at Sullivan & Cromwell in New York, N.Y. Perhaps it was this remove, both physical and psychological, that allowed Mr. Maples' pro bono counsel to simply walk away to other pursuits without withdrawing as required by the rules, ensuring new counsel were in place, or otherwise notifying the trial court that they were no longer representing him. That Mr. Maples was abandoned by his counsel cannot be denied. Both attorneys left their law firm without taking any of these steps. Each moved on to new positions – one at the European Union in Belgium and the other as a law clerk for a federal judge – that actually precluded them from continuing to provide any representation to Mr. Maples. Regardless of their reasons, Mr. Maples was left in the seemingly

---

[85] According to a January 2004 letter from William H. Pryor, Jr., then-Attorney General of the State of Alabama (and now a judge of the Eleventh Circuit Court of Appeals), of the 130 death row inmates in state postconviction or federal *habeas* proceedings as of June 2003, 92 had been represented by out-of-state law firms or public interest groups, and just seventeen had been represented by private practitioners within Alabama. *See* William H. Pryor, Jr., *Letter to the Editor*, Nat'l. L.J., Jan. 12, 2004.

secure but terribly mistaken knowledge that he had the representation of competent counsel, when in fact he had no representation at all.

The Sullivan & Cromwell attorneys who represented Mr. Maples engaged an Alabama attorney, John Butler, as local counsel for the sole purpose of having them admitted *pro hac vice*. Mr. Butler has made it clear that he never intended to provide any representation to Mr. Maples. Pet. App.255a-56a. This is not at all uncommon. Alabama formally requires local counsel to "accept joint and several responsibility with the foreign attorney" to provide representation and, in fact, to "personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court. . . ." However, it is an unfortunate fact of Alabama practice – certainly unknown to and not the fault of Mr. Maples – that this rule is rarely if ever enforced, especially in criminal cases. The fact is that local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted. This reality was eventually formally recognized by the amendment of the rules to provide an exception for pro bono attorneys, who are no longer required to even have local counsel.

Errors of counsel generally do not form the basis of cause for a default in the postconviction context so long as counsel remains the inmate's agent. But this Court has rightly recognized that counsels' abandonment of their client rises to a level of significance

much greater than simple negligence, and severs the inmate's responsibility for counsel's conduct. As Justice Alito explained in his concurrence in *Holland v. Florida*, 2010 WL 2346549 at *18 (Alito, J., concurring in part and concurring in the judgment), "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."

Numerous federal and state courts have recognized that when a client has been abandoned by counsel, the client cannot be held responsible for the consequences of that abandonment. *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905 (2004) (procedural default caused by counsel's "utter abandonment" of petitioner "constituted extraordinary circumstances external to the party's conduct" and established cause.); *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to client when attorney "does not actually represent the client."); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992) (attorney's conflict of interest would constitute external cause for default because attorney had "effectively ceased to be [the client's] agent"); *Puckett v. State*, 834 So.2d 676, 681 (Miss. 2002) (out-of-time appeal allowed where "actions of former counsel were such as to rise to the deprivation of fundamental due process"). The Supreme Courts of Arkansas and Tennessee, each addressing circumstances in which petitioners erroneously believed they were being represented by

counsel, have recognized the fundamental unfairness of saddling the abandoned client with the sins of counsel. *Porter v. State*, 2 S.W.3d 73, 74 (Ark. 1999) (finding cause to excuse petitioner's procedural default where attorney ceased representation but failed to withdraw, and recognizing fundamental unfairness of requiring "inmate on death row to abide by the stringent filing deadlines when he was under the impression he was represented by counsel"); *Williams v. State*, 834 S.W.3d 464, 469 (Tenn. 2001) ("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing certain remedies independently").

Even those inmates who *know* they are proceeding *pro se* have little hope in our byzantine system. "Without a lawyer, these indigent defendants have no realistic chance of challenging their convictions and death sentences, even though obvious and profound errors may have occurred during trial."[56] *See e.g.*, *Ex Parte Jenkins*, 972 So.2d 159, 164 (Ala. 2005) ("Because most Rule 32 petitioners file their petitions without the assistance of legal counsel, they could encounter serious problems if the relation-back doctrine was applied to Rule 32 proceedings"). Having been

---

[56] *American Bar Association, ABA Death Penalty Representation Project* 3 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/DPRP_Year_End_Brochure_2010.authcheckdam.pdf, visited May 22, 2011.

left unrepresented without notice, Mr. Maples does not have a prayer. It is simply unacceptable to us that the State should be allowed to maintain a system in which the last hope of the condemned can be snatched away, though they are without fault, leaving them with no recourse.

C. The State's Own Conduct Also Constituted Cause For Mr. Maples' Default.

Once he had no attorneys representing him, Mr. Maples was helpless – particularly because he was not only unrepresented, but he did not know it. Any inmate proceeding *pro se* in postconviction litigation is at dire risk of not receiving vital notice of developments. In Mr. Maples' case, the typical inability of an inmate to obtain timely and accurate information was compounded by the fact that he wrongly believed he was still represented by counsel. Although Mr. Maples had no way of knowing that his counsel were no longer representing him until he was contacted by the Attorney General's office in August 2003,[57] the court clerk's office learned much earlier that something was amiss. The orders mailed to Mr. Maples' attorneys in

---

[57] For whatever reason, the State saw fit to contact Mr. Maples directly to let him know of his deadline for filing a federal *habeas* petition, but apparently saw no purpose in contacting him earlier, while he still had time to file a notice of appeal. One wonders why the State bothered to notify Mr. Maples of the latter deadline, since it would then argue that all of his claims were precluded by his failure to appeal in state court.

New York were returned to the clerk, stamped with notices that the recipients were not known. Even a cursory review of the court file would have revealed that no other pro bono attorneys were participating in the case, and also would have yielded other avenues for contacting the attorneys. The court clerk's failure to make any further effort to ensure that Mr. Maples received notice of the order dismissing all of his claims is inexcusable, particularly in light of the fact that the original motions for *pro hac* admission filed by his departed counsel contained his attorneys' home addresses and personal telephone numbers. Certainly, the clerk's office should have invested the cost of two more postage stamps or a couple of long-distance phone calls to try to notify Mr. Maples of an order that could lead to his death.

This Court has recognized, in a case where the consequences were significantly less dire than in this case, that the State has a duty to make more than perfunctory efforts to provide notice. *Jones v. Flowers*, 547 U.S. 220, 238 (2006), involved a tax sale of the petitioner's home – no small matter, but certainly a less fundamental deprivation than the one at issue here. The official notice to the petitioner of the impending sale was returned because he had moved to a different address. In finding the State's notice insufficient, this Court noted that "someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could have been done." In this case,

the State had alternative ways to provide notice. It could have perused its own file and used the personal addresses and telephone numbers provided by the Sullivan & Cromwell attorneys. Or, it could have notified Mr. Maples directly by sending him a copy of the order. There was certainly no doubt about where to find him. Where the stakes were not a home, but a life, clearly "there was more that reasonably could have," and should have, been done.

CONCLUSION

For these reasons, we urge the United States Supreme Court to reverse the decision of the Eleventh Circuit.

Respectfully submitted,

LISA W. BORDEN
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECEIVED
AND
FILED

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS,
Interim Commissioner,
Alabama Department of Corrections,
Respondent.

On Writ of Certiorari to the Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Wayne Morse, Jr.
Counsel of Record
Susan J. Walker
Waldrep Stewart
& Kendrick, LLC
2323 Second Ave. N
Birmingham, AL 35203
(205) 254-3216
morse@wskllc.com

Christine A. Freeman
817 South Court Street
Montgomery, AL 36103

Attorneys for *Amicus Curiae*

May 25, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. IN ALABAMA COURTS, LOCAL COUNSEL HAS IMPORTANT RESPONSIBILITIES AFTER THE ADMISSION OF FOREIGN ATTORNEYS *PRO HAC VICE* 4

A. Local Counsel Has A Legal And Ethical Responsibility To Participate Actively In The Defense Of A Prisoner Client 5

B. Local Counsel In This Case Violated His Legal And Ethical Responsibilities To Participate Actively In The Defense Of A Prisoner Client 9

C. A Local Counsel Who Abandons A Prisoner Client Ceases To Be His Agent Or Attorney 10

D. When Local Counsel Abandons A Prisoner Client, The Client Has Demonstrated Cause To Excuse A Procedural Default 14

E. A Prisoner Abandoned By Local Counsel And Not Served With Notice Of A Critical Ruling, Is Denied Due Process Of Law 18

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Federal Cases

Baggett v. Bullitt,
377 U.S. 360 (1964) 15

Baldayaque v. United States,
338 F.3d 145 (2d Cir. 2003).....12, 13, 16, 17

Burns v. Windsor Ins. Co.,
31 F.3d 1092 (11th Cir. 1994) 19

Byrne v. Nezhat,
261 F.3d 1075 (11th Cir. 2001) 19

Carey v. Saffold,
536 U.S. 214 (2002) 17

City of West Covina v. Perkins,
525 U.S. 234 (1999) 19

Di Giovanni v. Camden Fire Ins. Ass'n.,
296 U.S. 64 (1979) 14

Downs v. McNeil,
520 F.3d 1311 (11th Cir. 2008) 12, 13, 17

Fay v. Noia,
372 U.S. 391(1963) 14

Federated Mut. Ins. Co. v. McKinnon Motors, LLC.,
329 F.3d 805 (11th Cir. 2003) 19

Fleming v. Evans,
481 F.3d 1249 (10th Cir. 2007) 17

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 16, 17, 22

Holland v. Florida,
____ U.S. ___, 130 S.Ct. 2549
(2010) 5, 14, 15, 16, 18, 22

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 16

In re JLJ, Inc.,
988 F.2d 112 (11th Cir. 1993) 12, 13, 17

J.J. McCaskill Co. v. United States,
216 U.S. 504 (1910) 11

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 18, 19

Lonchar v. Thomas,
517 U.S. 314 (1996) 15

Maples v. Allen,
586 F.3d 876 (11th Cir. 2009) 18

Miller v. French,
530 U.S. 327 (2000) 14

Munaf v. Geren,
553 U.S. 67493 (2008) 14

Nara v. Frank,
264 F.3d 310 (3d Cir. 2001) 16, 17

Nat'l Union Fire Ins. Co. v. Bonnanzio,
91 F.3d 296 (2d Cir. 1996) 12

Powell v. Alabama,
287 U.S. 45 (1932) 9, 19

Rouse v. Lee,
339 F.3d 238 (4th Cir. 2003) 12, 13, 17

Schuleter v. Varner,
384 F.3d 69 (3d Cir. 2004) 12, 13, 17

Spitsyn v. Moore,
345 F.3d 796 (9th Cir. 2003) 17

Union Cent. Life Ins. Co. v. Robinson,
148 F. 358 (5th Cir. 1906) 12

United States v. Shaffer Equip. Co.,
11 F.3d 450 (4th Cir. 1993) 20

United States v. Wynn,
292 F.3d 226 (5th Cir. 2002) 17

United States v. Martin,
408 F.3d 1089 (8th Cir. 2005) 17

Viteck v. Jones,
445 U.S. 480 (1980) 18

State Cases

Commonwealth Life Ins. Co. v. Wilkinson,
23 Ala. App. 561, 129 So. 300
(1930) 10, 11, 13, 17

Crawford v. Tucker,
258 Ala. 658, 64 So. 2d 411 (1953)..... 9

Daniel v. Scott,
455 So. 2d 30 (Ala. Civ. App. 1984) 10

Ex parte Sparks,
368 So. 2d 528 (Ala. 1979)..... 19

Florence v. Carr,
226 Ala. 654, 148 So. 148
(1933) 12, 13, 17

Howard v. McCarson,
215 Ala. 251, 110 So. 296 (1926) 10

Mitchum v. Hudgens,
533 So. 2d 194 (Ala. 1988)..... 9

National Bread Co. v. Bird,
226 Ala. 40, 145 So. 462 (1933)..... 9, 10

Thompson v. State,
860 So. 2d 907 (Ala. Crim. App. 2002)... .5, 18

STATUES AND RULES

Ala. R. Crim. P. Rule 32..... 7

Ala. R. Prof. Conduct, Preamble 5, 6

Ala. R. Prof. Conduct, Rule 1.1 ..... 6, 7, 13

Ala. R. Prof. Conduct, Rule 1.2 ..... 6, 7, 13

Ala. R. Prof. Conduct, Rule 1.3 ..... 6, 7, 13

Ala. R. Prof. Conduct, Rule 8.4 7

Ala. R. Prof. Conduct, Rule 8.4(d) 6, 7

Alabama Rules Governing Admission to the Alabama State Bar Rule VII.C ..... *in passim*

OTHER AUTHORITY

Federalist Papers No. 80, *The Powers of the Judiciary* 14, 15, 18

2d Corp. Jur. 868 (549) 10

6 Corp. Jur. 673 § 186 10

Merriam-Webster's Collegiate Dictionary 1-2 (11th ed. 2009) 9

Restatement (Third) of Agency § 5.04 (2006) 12, 13, 18

INTEREST OF *AMICUS CURIAE*

The Alabama Criminal Defense Lawyers Association[1] is a non-profit association for criminal defense attorneys, through which criminal defense lawyers express their positions on legislation, court reform, cases affecting rights of defendants, and other matters affecting criminal justice in Alabama. The organization seeks to promote administration of justice and to ensure that courts enforce maximum lawful access to justice by the criminally accused or convicted.

This organization is interested in this case because the Eleventh Circuit has denied access to federal constitutional review to Cory Maples and potentially others in his same circumstances: indigent Alabama Death Row prisoners who, through no fault of their own, relied on volunteer attorneys who missed court or appeal deadlines. The Eleventh Circuit's decision will also have a chilling effect on counsel who volunteer to represent Alabama Death Row prisoners in capital post-conviction litigation. Alabama does not have a state-funded post-conviction litigation program and limits reimbursement for court-appointed post-conviction counsel to $1,000. As a result, Alabama Death Row prisoners rely primarily on volunteer counsel to vindicate their federal constitutional rights.

---

[1] The parties consented in writing to the filing of this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of the brief. Attorneys for *Amicus Curiae* notified counsel of record for the parties 10 days prior to the due date for filing briefs.

SUMMARY OF ARGUMENT

No higher calling for a lawyer exists than to represent a death-row inmate. A person's life is at stake, and appreciation for the rights guaranteed by our constitution is heightened. The assistance of counsel, however, is essential to ensure that the inmate's rights are secured. Beyond the maze of constitutional questions and procedural rules, pedestrian-sounding tasks must be performed promptly and fully. If left undone, the inmate's life is jeopardized, and his constitutional rights are at risk.

The United States has witnessed sea changes in the representation of death-row inmates in the last fifty years. Impecunious and unpopular prisoners often obtain the *pro bono* services of lawyers practicing at nationally recognized firms. The practice of law, however, by necessity starts locally. Alabama, for example, requires all out-of-state counsel to associate with local counsel whose responsibilities are unambiguously described in the rules governing professional conduct and *pro hac* admission. Despite the transformations in litigating capital cases, the same ethical principles that governed John Adams and Abraham Lincoln apply today to all counsel for the condemned: diligence, loyalty and communication.

This appeal is before this Court because Cory Maples' local counsel in Alabama, by his own admission, failed in all of his duties. After Maples was convicted and sentenced to death, he was represented locally by John G. Butler. His *pro hac*,

pro bono lawyers, practicing at the law firm of Sullivan & Cromwell in New York, assisted Maples in filing a petition for post-conviction relief, but did not receive the state court's notice of denial of that petition. By that time they had left Sullivan & Cromwell and moved on to other jobs. Local counsel was Maples' only remaining advocate in the Rule 32 proceeding. But local counsel, Butler, did nothing. Indeed, Butler abandoned Maples at the very outset by agreeing only to facilitate the admission of Maples' out-of-state *pro bono* counsel, and thus refusing to undertake the meaningful attorney-client relationship directed by Alabama law.

Maples sat abandoned and uninformed in an Alabama cell. All deadlines passed. No lawyer filed a timely appeal from the denial of his petition for post conviction relief. Alabama law prohibited court clerks from accepting his *pro se* papers, even if the clerk knew the inmate's lawyers had deserted him. Absent relief from this Court, Maples has no chance for post-conviction review. His constitutional rights are lost, and his fate is certain.

In garden-variety commercial cases, courts routinely find that a principal is not charged with notice when the agent is guilty of abandonment. In this capital case, in which Maples' life hangs in the balance, he is merely asking for the same relief. Maples should not be denied *habeas corpus* review. To do so would violate his constitutional rights to due process and conflict with basic common law agency principles.

ARGUMENT

I. In The Courts Of Alabama Local Counsel Has Important Responsibilities After The Admission Of Foreign Attorneys *Pro Hac Vice.*

From 1994 until 2006, Alabama Rules Governing Admission to the Alabama State Bar, Rule VII.C. provided:

> No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the Alabama State Bar (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel shall personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court, unless specifically excused from such appearance by the court or administrative agency. Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

The importance of joint and several responsibility to the client is that an individual represented by counsel may not file an appeal or pleadings *pro se*. *See Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002). "When a party is represented by counsel, the clerk may not accept a brief from that party." Rule 31(a), Ala. R. App. P. *See Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549, 2556-57, 2559 (2010) (On several occasions, Florida objected to Albert Holland filing *pro se* papers while he was represented by counsel and in state court Holland's requests were denied.)

A. Local Counsel Has A Legal And Ethical Responsibility To Participate Actively In The Defense of A Prisoner Client

The "Preamble: A Lawyer's Responsibilities," Ala. R. Pro. Conduct, provided:

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> ....
>
> In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation....
>
> ....
>
> ... Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

At all times relevant, Ala. R. Prof. Conduct, Rule 1.1 provided that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Comment to Rule 1.1, Ala. R. Prof. Conduct.

Rule 1.2 mandated that a lawyer not willfully neglect any legal matter entrusted to him. Rule 1.3 mandated that a lawyer keep his client reasonably informed about the status of his case and to promptly comply with any request for information. Rule 1.3 further mandated that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 8.4(d) provided that a lawyer was guilty of professional misconduct to "engage in conduct that is prejudicial to the administration of justice."

The affidavit testimony of local counsel in this case, John G. Butler, states that he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not

have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case" establishes a clear violation of Rule VII.C. Further, a finder of fact could reasonably infer and find, from Butler's affidavit testimony, that he intentionally did not comply with Rules 1.1, 1.2, and 1.3 because he had intentionally determined that his sole role would be to have New York counsel admitted *pro hac*. Such willful flouting of the Rules was in the sole interest of Butler and not in the interest of Cory Maples. Accordingly, Butler's actions or inactions could not even charitably be said to constitute a legal representation of Cory Maples.

A review of the record evidences Butler's non-representation of Cory Maples. Butler did not sign or appear on pleadings, as more than local counsel, until after Maples discovered that his Rule 32 petition had been denied by the trial court. Thus, the record indicates that Butler did not take a role in representing Maples until it was discovered or it would be discovered that he had willfully failed to comply with his Rule VII.C. duties, his officer of the Court obligations, and his Rules 1.1, 1.2, and 1.3 duties.

Moreover, at all times relevant, Rule 8.4, Ala. R. Prof. Conduct, provided, in pertinent part, that "[i]t is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice;" or "(g) engage in any other conduct that adversely reflects on his fitness to practice law."

B. Local Counsel In This Case Violated His Legal and Ethical Responsibilities to Participate Actively In the Defense Of A Prisoner Client

Rule VII.C. required local counsel John G. Butler to "accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause." According to Butler's affidavit testimony, he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case." Once again, by his own admission, Cory Maples' local counsel, Butler, prepared to be and executed as a mere facilitator for the *pro hac* admission of local counsel.

Sadly, Butler's conduct is commonplace for local counsel in Alabama working with out-of-state *pro bono* counsel in capital cases. Local counsel in such cases often limit their role merely to facilitating out-of-state representation and do nothing more, as was true for Butler here. Such is their expectation, as well as habit and custom. The practice of local counsel is well known in the Alabama, making it even more important for court clerks to ensure that notice is received by out-of-state counsel.

"Abandon" is defined as "to withdraw protection, support, or help from" or "to cease

intending or attempting to perform." *Merriam-Webster's Collegiate Dictionary* 1-2 (11th ed. 2009). Under the circumstances, local counsel Butler, as a special agent of Cory Maples, had a duty and obligation to communicate to Cory Maples the denial of Maples's Rule 32 petition. However, Butler's affidavit makes clear that he "had no substantive involvement in th[e] case" after appearing as local counsel" and after telling "Ms. Ingen-Housz and Mr. Munanka" that he "did not have the resources, available time or experience to make it appropriate for [him] to deal with substantive issues in the case," he did nothing more, in particular he did not communicate with Cory Maples. Accordingly, a reasonable inference from Butler's affidavit testimony is that he "cease[d] intending or attempting to perform" his obligations under Rule VII.C., Alabama Rules Governing Admission to the Alabama State Bar, and Rules 1.1, 1.2, and 1.3, Ala. R. Prof. Conduct, to Cory Maples from the beginning of his representation of Cory Maples. *Merriam-Webster's Collegiate Dictionary* 1-2.

C. Local Counsel Who Abandons His Prisoner Client Ceases To Be The Agent Or Attorney of the Client.

Under Alabama law, "an attorney at law 'is the special agent of his client, whose duties, usually are confined to the vigilant prosecution or defense of the suitor's rights.' *Gullett v. Lewis*, [3 Stew. 23 (1830)]." *National Bread Co. v. Bird*, 226 Ala. 40, 42, 145 So. 462, 463 (1933). *Accord Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988); *Crawford v. Tucker*, 258 Ala. 658, 663, 64 So. 2d 411, 416 (1953);

Daniel v. Scott, 455 So. 2d 30, 33 (Ala. Civ. App. 1984). "The power of an attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is, as has been said in numerous decisions of this court, a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of the client....' *Robinson v. Murphy*, [69 Ala. 543 (1881)]." *National Bread Co.*, 226 Ala. at 42, 145 So. at 463.

In 1926, the Alabama Supreme Court held that "'[w]hen an attorney accepts a retainer to conduct a legal proceeding, he enters into an entire contract to conduct the proceedings to a conclusion, and he may not abandon his relation without justifiable cause, or the consent of his client....'" *Howard v. McCarson*, 215 Ala. 251, 253, 110 So. 296, 297 (1926) (quoting 6 Corp. Jur. 673, 674, § 186). "The general rule is ... the[re is a] presumption that the agent will inform the principal in the line and scope of his duty, but no such presumption arises when the agent is acting for himself adversely to his principal, nor will he be presumed to communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal." *Commonwealth Life Ins. Co. v. Wilkinson*, 23 Ala. App. 561, 563, 129 So. 300, 301 (1930).

According to the Alabama Court of Appeals:

> In the text, 2d Corpus Juris, 868 (549), the rule is stated thus: 'The rule that notice to an agent is notice to his principal does not apply when the circumstances are such as to raise a

> clear presumption that the agent will not transmit his knowledge to his principal; and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein.' ... In ... *Frenkel [v. Hudson*, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736 (1886)], Mr. Justice Somerville, speaking said 'It [the rule] is based on the principle that it is the duty of the agent ... to communicate the information obtained by him to his principal so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely, in such case, act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. ... It would be both unjust and unreasonable to impute notice by mere construction under such circumstances.'"

Wilkinson, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord J.J. McCaskill Co. v. United States*, 216 U.S.

504, 514 (1910); *Union Cent. Life Ins. Co. v. Robinson*, 148 F. 358, 360 (5th Cir. 1906); *Florence v. Carr*, 226 Ala. 654, 656, 148 So. 148, 149 (1933).

Further, when "an agent occupies a dual relation, notice acquired by him in such other agency is not binding on the principal--this is sound in principle and necessary to a right conduct of the agency and fidelity to the respective principals." *Florence*, 226 Ala. at 656, 148 So. at 149.

"[U]nder fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests." *Downs v. McNeil*, 520 F.3d 1311, 1321 (11th Cir. 2008). *Accord In re JLJ, Inc.*, 988 F.2d 112, 116 (11th Cir. 1993) ("[T]he general rule is that an agent's act against the general interest of the principal is void...."); *Schuleter v. Varner*, 384 F.3d 69, 81 (3d Cir. 2004) (Ambro, J., dissenting) ("[W]hen ... an attorney ceases altogether to serve the interests of his client, the law of agency is clear that the attorney acts alone."); *Baldayaque v. U.S.*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'" (quoting *Nat'l Union Fire Ins. Co. v. Bonnanzio*, 91 F.3d 296, 303 (2d Cir. 1996)); *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (suggesting that equitable tolling may be appropriate where attorney conduct reaches the level of "utter abandonment."); *Restatement (Third) of Agency* § 5.04 (2006) ("[N]otice of a fact that an agent knows or has reason to know is not imputed to

the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.")

Butler abandoned Cory Maples. When Butler acted adversely to Maples by not acting or communicating in any way with Maples in violation of Rule VII.C., Alabama Rules Governing Admission to the Alabama State Bar, and Rules 1.1, 1.2, and 1.3, Ala. R. Prof. Conduct, Butler ceased to be the special agent or attorney of Cory Maples and acted in his own interests of not performing duties or obligations to Cory Maples. Butler's affidavit contains an admission of his conflict of interest evidencing his abandonment of Maples by focusing his "time" and "resources" elsewhere, presumably on other clients.

Under the above-quoted agency-principal tenets of law, when Butler ceased being the special agent or attorney of Cory Maples, notice to Butler was not notice to Maples. *Wilkinson*, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord Florence*, 226 Ala. at 656, 148 So. at 149; *Downs*, 520 F.3d at 1321; *In re JLJ, Inc.*, 988 F.2d at 116; *Schuleter*, 384 F.3d at 81 (Ambro, J., dissenting); *Baldayaque*, 338 F.3d at 154 (Jacobs, J., concurring); *Rouse*, 339 F.3d at 250 n.14; *Restatement (Third) of Agency* § 5.04 (2006).

D. When Local Counsel Abandons A Prisoner, Client, The Client Has Demonstrated Cause To Excuse A Procedural Default.

"Habeas Corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 553 U.S. 67493 (2008) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). *Accord Holland*, 130 S.Ct. at 2560. Courts in equity "tailor relief, and related procedure, to the exigencies of particular cases and individual circumstances." *Miller v. French*, 530 U.S. 327 (2000) (Breyer, J., joined by Stevens, J., dissenting). *See also Federalist* Papers No. 80, *The Powers of the Judiciary*, Hamilton, Alexander ("It has also been asked, what need of the word 'equity'? What equitable cause can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not invoke those ingredients of *fraud, accident, trust, or hardship*, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate.").

Courts of equity are not "controlled by rigid rules adhered to." *Di Giovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 70 (1979). *Accord Holland*, 130

S.Ct. at 2554 ("In the Court of Appeals' view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, that conduct, even if it is 'negligent' or 'grossly negligent,' cannot 'rise to the level of egregious attorney misconduct' that would warrant equitable tolling unless the petitioner offers 'proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth.' 539 F.3d 1334, 1339 (C.A.11 2008) (per curium). In our view, this standard is too rigid.")

In *Holland*, this Court said:

> In this case, the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is 'grossly negligent' can never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.' 539 F.3d at 1339. Bur in our view, the Court of Appeals' standard is too rigid.
>
> "We had said that courts of equity 'must be governed by rules and precedents no less than the courts of law.' *Lonchar v. Thomas*, 517 U.S. 314, 323 ... (1996) (internal quotation marks omitted). But we have also made clear that often the 'exercise of a court's equity powers ... must be made on a case-by-case basis.' *Baggett v. Bullitt*,

> 377 U.S. 360, 375 ... (1964). In emphasizing the need for 'flexibility,' for avoiding 'mechanical rules.' *Holmberg v. Armbrecht*, 327 U.S. 392, 396 ... (1946), we have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 ... (1944). The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.' *Ibid.* (permitting post-deadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of proper precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."

130 S.Ct. at 2562-63.

Before this Court's decision in *Holland*, several Circuits held that serious misconduct by an attorney may constitute an extraordinary circumstance for equitable tolling. *Baldayaque v.*

United States, 338 F.3d 145, 152 (2d Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *abrogated in part, Carey v. Saffold*, 536 U.S. 214 (2002); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Spitsyn v. Moore*, 345 F.3d 796, 801-02 (9th Cir. 2003); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007). Butler's abandonment of Cory Maples, however, is more than ineffectiveness or incompetence of counsel. Butler's abandonment of Maples is the severing of the agent-principal relationship.

Under the "equitable principles" governing habeas, Maples should not be held responsible for his own abandonment. As this Court said in *Holland*, "[c]ourts of equity have sought to relieve 'hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 ... (1944)." 130 S.Ct. at 2563.

When Butler ceased being the special agent or attorney of Maples, any notice to Butler was not notice to Maples. Equity and justice require that Cory Maples not be penalized because Butler abandoned Maples and ceased performing legal duties. *Wilkinson*, 23 Ala. App. at 563-64, 129 So. at 301-02. *Accord Florence*, 226 Ala. at 656, 148 So. at 149; *Downs*, 520 F.3d at 1321; *In re JLJ, Inc.*, 988 F.2d at 116; *Schuleter*, 384 F.3d at 81 (Ambro, J., dissenting); *Baldayaque*, 338 F.3d at 154 (Jacobs, J., concurring); *Rouse*, 339 F.3d at 250 n.14;

Restatement (Third) of Agency § 5.04 (2006). Under equitable principles, *Holland*, 130 S.Ct. at 2562-63, and *Federalist* Papers No. 80, *The Powers of the Judiciary*, Cory Maples demonstrated extraordinary circumstances that excuse his procedural default, warranting review of his *habeas corpus* petition.

In *Maples v. Allen*, 586 F.3d 876, 888-89 (11th Cir. 2009), the Eleventh Circuit failed to recognize that Cory Maples could not have filed any pleadings, any appeals, or otherwise appeared *pro se*. The Eleventh Circuit further failed to recognize that attorney abandonment was a ground for an out-of-time appeal and failed to address *Thompson, supra*. The Eleventh Circuit failed to exercise its equitable powers and grant Cory Maples relief from the Maples' abandonment by counsel.

E. A Prisoner Abandoned By Local Counsel And Not Served With Notice Of Critical Ruling Is Denied Due Process Of Law.

The Fourteenth Amendment prohibits "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." "'Each of our due process cases has recognized, either explicitly or implicitly that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (quoting *Viteck v. Jones*, 445 U.S. 480, 491 (1980)). "As our decisions

have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Zimmerman Brush Co.*, 455 U.S. at 434. "A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999).[2]

"Attorneys are officers of the court...." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). *Accord Federated Mut. Ins. Co. v. McKinnon Motors, LLC.*, 329 F.3d 805, 808-09 (11th Cir. 2003); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *Ex parte Sparks*, 368 So. 2d 528, 533 (Ala. 1979). "[I]n addition to his duty of diligently researching his client's case, [an attorney] always has a duty of candor to the tribunal." *Burns*, 31 F.3d at 1095. "The duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience." *Burns*, 31 F.3d at 1095 n5. "[A]s an officer of the court[, counsel has] 'a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."

---

2 The Alabama Criminal Defense Lawyers Association agrees completely with the Petitioner's points and authorities on notice. (*See* Brief of Petitioner, pp. 22-34.) This *amicus* brief focuses on the failings of local counsel, not the adequacy of the notice provided by the State. Nonetheless, as Petitioner has explained, the notice in this case created an unreasonable risk of confusion for a local counsel performing his ethical obligations because both Alabama law and the order denying Maples' Rule 32 petition required that *all* attorneys of record be served, thus entitling local counsel to presume that (at least) reasonable efforts to notify out-of-state counsel would in fact be made. *Id.* at 16.

Byrne v. Nezhat, 261 F.3d 1075, 1117 n.83 (11th Cir. 2001) (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

Butler had a continuing duty to inform the Morgan County Circuit Court that he did not intend to personally appear at any hearing on Maples' Rule 32, Ala. R. Crim. P., petition, and that he was not accepting joint and several responsibility with Ms. Ingen-Housz and Mr. Munanka to Maples, to the State of Alabama, and to the Morgan County Circuit Court in all matters arising from Maples' Rule 32 petition.

Butler failed to be candid with Maples, the Court, and the State of Alabama that he was not fulfilling his responsibilities under Rule VII.C. As a direct result of Butler's failure to satisfy his duty of candor as an officer of the Court, Maples was denied his appeal of right of the denial of his Rule 32 petition by the Morgan County Circuit Court, as well as all other post-conviction relief mechanisms to determine whether the State of Alabama has the right to take his life.

Butler's abandonment of Maples deprived him of notice of the denial of his Rule 32 petition, of timely appeal of the denial of his Rule 32 petition, and judicial review of his *habeas corpus* petition. Butler's abandonment of Maples effectively denied him due process of law and, unless equitable principles are applied to permit judicial review of his *habeas corpus* petition, Butler's actions deny Maples judicial review that could reverse his conviction or his sentence and save him from execution. To

permit an attorney to abandon a client during post-conviction without finding extraordinary circumstances to allow judicial review, grants deprivation of life without due process of law. It ignores the equitable powers with which the Founding Fathers imbued federal courts. Further, Butler's failure to comply with Rule VII.C, and with his duty of candor as an officer of the court, has effectively denied Cory Maples of his life and liberty without due process of law.

CONCLUSION

John G. Butler's abandonment of Cory Maples during the pendency of Maples' Rule 32 petition severed the attorney-client and the principal-special agent relationship. Thus, notice to Butler of the denial of Maples' Rule 32 petition was not notice to Maples. The equity powers of this Court, as well as the lower federal courts, were intended to correct "hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which if strongly applied, threaten the 'evils of archaic rigidity,' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 ... (1944)." 130 S.Ct. at 2563. To permit the denial of Maples' *habeas corpus petition* without a review of the merits is inequitable, as well as a miscarriage of justice.

Respectfully submitted,

Wayne Morse, Jr.
Counsel of Record
Susan J. Walker
2323 Second Ave. N
Birmingham, AL 35203

Christine A. Freeman
817 South Court Street
Montgomery, AL 36103

Attorneys for *Amicus Curiae*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICI CURIAE THE CONSTITUTION PROJECT AND CATO INSTITUTE IN SUPPORT OF PETITIONER

VIRGINIA E. SLOAN
MARY SCHMID MERGLER
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 580-6920

TIMOTHY LYNCH
ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

Counsel for Amici Curiae

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE STATE FAILED TO PROVIDE MAPLES ADEQUATE NOTICE 5

A. The State Failed To Take Reasonable Steps To Notify Maples Of An Order That Could Result In His Death. 5

B. If The Default Is Not Excused, The State's Inaction Will Deny Maples Meaningful Access To The Courts. 11

II. MAPLES' COUNSEL ABANDONED HIM. 15

III. EQUITY REQUIRES EXCUSING THE DEFAULT UNDER THESE CIRCUMSTANCES. 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES:

Babich v. *Clower*, 528 F.2d 293 (4th Cir. 1975) 11

Barbour v. *Haley*, 471 F.3d 1222 (11th Cir. 2006) 13

Bounds v. *Smith*, 430 U.S. 817 (1977) 12, 14

Brown v. *Allen*, 344 U.S. 443 (1953) 6

Coleman v. *Thompson*, 501 U.S. 722 (1991) 5, 15, 16, 17

Dretke v. *Haley*, 541 U.S. 386 (2004) 19

Dugger v. *Adams*, 489 U.S. 401 (1989) 19

Engle v. *Isaac*, 456 U.S. 107 (1982) 19

Greene v. *Lindsey*, 456 U.S. 444 (1982) 7

Gregg v. *Georgia*, 428 U.S. 153 (1976) 20

Holland v. *Florida*, 130 S. Ct. 2549 (2010) 16, 17, 18

Jones v. *Cunningham*, 371 U.S. 236 (1963) 19

Jones v. *Flowers*, 547 U.S. 220 (2006) 7, 8, 9

Lewis v. *Casey*, 518 U.S. 343 (1996) 12

McCleskey v. *Zant*, 499 U.S. 467 (1991) 19

Mennonite Bd. of Missions v. *Adams*, 462 U.S. 791 (1983) 7

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 7, 9

Munaf v. *Geren*, 553 U.S. 674 (2008) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Murray v. *Carrier*, 477 U.S. 478 (1986) 5, 6, 15, 17, 18

Murray v. *Giarratano*, 492 U.S. 1 (1989) 12, 13

Reed v. *Ross*, 468 U.S. 1 (1984) 17

Sanders v. *United States*, 113 F.3d 184 (11th Cir. 1997) 14

Schlereth v. *Hardy*, 280 S.W.3d 47 (Mo. 2009) 8, 9

Schlup v. *Delo*, 513 U.S. 298 (1995) 18

Strickland v. *Washington*, 466 U.S. 668 (1984) 19

Strickler v. *Greene*, 527 U.S. 263 (1999) 6, 9, 10, 20

Sumner v. *Shuman*, 483 U.S. 66 (1987) 20

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 20

STATUTES:

28 U.S.C. § 2243 ..... 18, 19

Ala. Code § 15-12-21 (1975) 21

RULES:

Ala. R. Crim. P. 32 17

Ala. R. Crim. P. 34.4 10

Ala. R. Crim. P. 34.5 14

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER MATERIAL:

The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) 2, 3

IN THE

Supreme Court of the United States

No. 10-63

CORY R. MAPLES,

Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICI CURIAE THE CONSTITUTION PROJECT AND CATO INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] The Project's essential mission is to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and filed consent letters with the Clerk.

promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness.

The Committee issued its first report in 2001, and in 2005 issued an updated version of its report with thirty-two consensus recommendations. *See* The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) (www.constitutionproject.org/manage/file/30.pdf). The report concludes, *inter alia*, that the "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as

currently administered, arbitrary, unfair, and fraught with serious error." *Id.* at 1.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. The instant case concerns Cato because it represents a disruption in the rule of law caused by the State's own misconduct: notice and the opportunity for hearing are fundamental to the process due any individual upon whom the weight of government power is brought to bear. Cato takes no position on the merits of the death penalty other than that the Constitution does not prohibit it.

SUMMARY OF THE ARGUMENT

The representation of prisoners accused of capital crimes or sentenced to death is unique in its difficulty, and in its consequences when that representation is inadequate. The administration of justice in such cases depends on an effective system of representation for indigent defendants, and constitutionally adequate performance by both courts and counsel in ensuring that prisoners receive fair notice of orders on which their lives may depend. This case, however, exposes some of the serious cracks in that system. The lower courts held that petitioner Cory Maples may be put to death despite potentially meritorious claims that may save his life,

where he did not receive notice of a deadline-triggering order because his principal counsel left the representation for other jobs, and a court clerk did nothing when the letter to them containing the order was returned unopened.

As explained below and in petitioner's brief, there is cause to excuse the resulting default under basic notions of procedural due process and in light of the abdication of Maples' counsel. Even when property interests far less significant than a man's life are at stake, this Court has consistently held that the government must take steps reasonably calculated to ensure notice given all the relevant circumstances. And that is particularly true where, as here, the State represented that that notice was being given to all counsel yet did nothing when it learned that this representation was untrue.

Indeed, if the default is not excused, Maples will be denied his right to meaningful access to the courts. Alabama has chosen not to provide counsel in post-conviction proceedings and instead to rely largely on out-of-state *pro bono* counsel. But if that system is to work, the State must take the most basic steps to ensure that defendants themselves receive notice of orders when the State learns that counsel have abandoned the representation. And that abandonment is yet another reason to excuse the default. This was not an error made by Maples' counsel in the course of representing him; it was a complete abdication of the representation.

But in the end, this case does not turn on whether the State's conduct rises to the level of a constitutional violation or whether counsel's abandonment, standing alone, would constitute cause. This case turns not on precise notions of constitutional error,

but rather on the flexible, equitable discretion to excuse defaults that is inherent in the Great Writ of habeas corpus. The issue in this case transcends views on the death penalty, on which amici have taken no position. It transcends views on the constitutional rights of prisoners. This case measures our courts' basic commitment to correct what reasonable observers would readily perceive as a miscarriage of justice. The orderly functioning of the U.S. criminal justice system will not be impaired if Maples' federal habeas claims are heard, given the constellation of egregious circumstances that underlie this case. But if he is allowed to die with those claims left unheard, damage could be done to the well-deserved reputation of the Nation's judiciary as the ultimate guardian of liberty and justice.

ARGUMENT

I. THE STATE FAILED TO PROVIDE MAPLES ADEQUATE NOTICE.

A. The State Failed To Take Reasonable Steps To Notify Maples Of An Order That Could Result In His Death.

The question in this case is whether there is "cause" to excuse Maples' failure to timely appeal the denial of his state-court petition for post-conviction relief, and thereby allow consideration of federal habeas claims that could save his life. This equitable inquiry focuses on whether the cause of the default may "fairly be attributed" to the petitioner himself or instead to some "external" factor. *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991); *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) (cause requires that "some objective factor external to the defense

impeded counsel's efforts"). In this case, one such external factor was the State itself.

1. When there has been a procedural default, a showing "that 'some interference by officials,' made compliance impracticable, would constitute cause." *Murray*, 477 U.S. at 488 (quoting *Brown* v. *Allen*, 344 U.S. 443, 486 (1953)). *Accord Strickler* v. *Greene*, 527 U.S. 263, 283 n.24 (1999). Here, more than "some interference by officials" led to the procedural default. The state court affirmatively represented that Maples' principal counsel were being notified of the deadline-triggering order, yet the clerk's office took no action to ensure actual notice when it learned that the representation was incorrect. And there can be no legitimate dispute that the default would not have occurred but for these failures.

The Alabama court order denying post-conviction relief recited that *all* counsel were being notified—specifically including Maples' out-of-state counsel handling the substance of his case. JA225 ("CC" notation on order specifically listing out-of-state counsel). The court clerk undertook to carry out this judicial directive by sending the order to those counsel. The mandated notice, however, never occurred because Maples' counsel had left their jobs and a New York mailroom returned the letters unopened. Yet when the clerk's office learned that the notice was never made and therefore that the court's contrary representation was incorrect, it made no attempt to rectify the problem. It did not try to locate Maples' counsel; it did not contact Maples himself in prison (as the prosecution did only after the default); and it did not inform local counsel that the court-mandated notice was never made. Instead, someone just put the returned letters in a file drawer.

As petitioner has shown, Pet. Br. 23-34, these failures by the State not only demonstrate cause to excuse the default, but also violate fundamental principles of procedural due process. The bare "minimum" requirement of the Due Process Clause is that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Notice must be "reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314 (emphasis added). When notice is due, "process which is a mere gesture is not due process." *Id.* at 315. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*

In *Mullane*, which involved a deprivation of property, the Court held that because the State knew the addresses of the owners there was "no tenable ground for dispensing with a *serious effort* to inform them personally." *Id.* at 318 (emphasis added). And in other property cases, the Court has required specialized efforts at notice, varying on the particular circumstances. *See Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 799 (1983) (where state is aware of recipient's "inexperience or incompetence," Court has required "particularly extensive efforts" at notice); *Greene* v. *Lindsey*, 456 U.S. 444, 453 (1982) (notice must account for fact that notices posted on apartment doors were "not infrequently" removed).

Moreover, as the Court held in *Jones* v. *Flowers*, 547 U.S. 220 (2006), due process requirements

continue to follow the State *after* an unsuccessful attempt at notice. There, repeat attempts to send a tax sale notice to a homeowner by certified mail resulted in the return of the unopened packet. *Id.* at 223-24. Knowledge that the attempted notice was ineffective "triggered an obligation on the government's part to take *additional steps* to effect notice," *id.* at 230 (emphasis added), and the failure to follow up was unreasonable even though the letters were reasonably calculated to reach their intended recipients when delivered to the postman. *Id.* at 229.

As the Court analogized, "[i]f the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again." *Id.* "[N]o one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.'" *Id.* (citation omitted). When exerting extraordinary power against a property owner, "[i]t is not too much to insist that the State *do a bit more* to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id.* at 239 (emphasis added). But the State did "nothing." *Id.* at 234.

Under *Jones*, due process requires corrective action even when the failure of notice is due to the recipient's own *willful* actions. In *Schlereth* v. *Hardy*, 280 S.W.3d 47 (Mo. 2009) (en banc), the purchaser of property at a tax delinquency sale complied with a statutory requirement by attempting to send notice to the former owner by certified mail. The former owner, however, willfully refused to

claim the mail. Nevertheless, the court held that because the purchaser knew that notice had not been effected, *Jones* required him "take additional steps to ensure adequate notice" and he "may be well advised to use a process server to ensure that the *best notice practicable* is delivered if the addressee does not sign for it." *Id.* at 52 (emphasis added).

In this case, it is even more clear that the State's efforts at notice were neither "appropriate to the nature of the case" nor reasonably calculated to provide Maples actual notice "under all the circumstances." *Mullane*, 339 U.S. at 313-14. In *Jones*, the State's efforts were particularly deficient given that "the subject matter of the letter concern[ed] such an important and irreversible prospect as the loss of a house." 547 U.S. at 230. This case involves the most important and irreversible deprivation that can ever exist: a man's *life* was at stake. If due process requires notice before property can be taken—and it does—then surely it requires at least the same notice before a life can be taken. Accordingly, even more so than in *Jones*, the State was required to "take additional steps" and "do a bit more" to provide notice. *Id.* at 230, 239.

2. Nor can the State's failures be disregarded because Maples' local counsel could have learned, with additional inquiry, that the court's order erred in stating that principal counsel would be notified. Under this Court's precedents, there is cause to excuse a habeas petitioner's procedural default where the State has made an erroneous representation on which counsel reasonably relies.

In *Strickler* v. *Greene*, *supra*, a petitioner's post-conviction counsel failed to raise a *Brady* claim that

prosecutors withheld exculpatory witness interview documents, yet the Court found cause to excuse that default. The Court recognized that counsel "must have known" of the interviews, 527 U.S. at 285, but counsel did not investigate the possible existence of undisclosed documents, which were eventually revealed in discovery in the federal habeas proceeding. Nevertheless, the Court held that cause existed to excuse the default because petitioner's counsel reasonably relied on the State's "open file" policy, under which the prosecution allowed access to all its files and which constituted an "implicit representation" that all exculpatory materials were contained in those files. *Id.* at 284. Counsel was entitled to rely on "[t]he presumption, well established 'by tradition and experience,' that prosecutors have fully 'discharged their official duties.'" *Id.* at 286 (citations and quotations omitted).

Here, there was an *explicit* representation by the State, through a notation in a court order, that Maples' principal counsel were being notified. *See also* Ala. R. Crim. P. 34.4 (requiring service on all attorneys of record). And Maples' local counsel, who never undertook to handle any substantive aspects of the representation, was reasonably entitled to rely on the correctness of that notation given the presumption that the court clerk had fully discharged his official duties. When the clerk learned that those duties had not been properly discharged, the clerk had an obligation to do *something* to correct the error, either by attempting to locate the *pro bono* counsel, or by informing Maples or his local counsel that the court-ordered notice was not made.

Even where a man's life does not depend on it, a missed deadline will be excused where a clerk fails to

take such corrective action. For example, in *Babich* v. *Clower*, 528 F.2d 293 (4th Cir. 1975), a court had instructed the clerk to serve a deadline-triggering order on "all counsel of record." *Id.* at 295. Local counsel received the order but out-of-state lead counsel did not, resulting in a missed appeal deadline. A rule provided that service on local counsel was considered the equivalent of service on all parties for whom the local counsel appeared. Nevertheless, the court held that where the clerk has instructed that "all counsel of record" receive an order, it is reasonable for local counsel to assume that out-of-state lead counsel will receive and act on the order as they had in the past. In such circumstances, the court refused to deprive the plaintiffs of a right to appeal that was lost "through no fault of their own." *Id.* The court made clear that local counsel could reasonably rely on the court-ordered statement that *all* counsel of record were served, regardless of the language of the local rule. *Id.* at 296.

Where the State undertakes an obligation to notify all counsel of a court order that could result in a person's execution and has represented that this obligation will be discharged, it cannot sit idly by and do nothing when it learns that the notice was never made. No person should be put to death because government officials have failed to carry out such basic and obvious duties.

B. If The Default Is Not Excused, The State's Inaction Will Deny Maples Meaningful Access To The Courts.

There is even more cause to excuse Maples' default in this case, because the State's affirmative obligations to him go beyond the mere minimum

notice requirements of due process. It is "established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977). *See also Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). The right of access includes habeas proceedings. *Bounds*, 430 U.S. at 821-22. *See also Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O'Connor, J., concurring) (recognizing right of "meaningful access" to post-conviction process). If the State's failure of notice is not rectified in this case, Maples will have been denied that constitutional right.

Just like its affirmative obligations under *Jones* to ensure adequate notice, the State has "affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824. Thus, in *Bounds*, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. The State must ensure that prisoners have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825.

In *Murray* v. *Giarratano*, *supra*, the Court held that Virginia's lack of appointed counsel for post-conviction proceedings did not deny prisoners meaningful access to the courts. Justice Kennedy, however, provided the critical fifth vote, noting that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." 492 U.S. at 14 (Kennedy, J., concurring). His opinion confirmed that whatever

combinations of resources states dedicate to ensure prisoners' ability to file habeas petitions, that scheme must ensure meaningful access to the courts. *Id.* On the facts of that case, Justice Kennedy found that "[w]hile Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id.* at 14-15.

The assurances Justice Kennedy found sufficient in *Murray* were absent from this case. The Eleventh Circuit has held that Alabama is not constitutionally required to provide counsel for post-conviction capital proceedings. *See Barbour* v. *Haley*, 471 F.3d 1222 (11th Cir. 2006). And Alabama, alone among all the states, has not done so. Instead, Alabama has chosen to rely on whatever representation a prisoner can locate on his own, which in most cases is out-of-state *pro bono* counsel like those who were initially representing Maples. *See* Pet. Br. 3-6. Alabama justifies this system because it believes it can rely on "'the efforts of typically well-funded out-of-state volunteers.'" *Id.* at 4 (citation omitted).

If Alabama is going to rely upon this patchwork system, however, the State must make sure it works. Given that Alabama relies on out-of-state counsel to ensure that condemned prisoners have meaningful access to post-conviction proceedings, it needs to take basic steps to ensure that these counsel receive adequate notice of court orders and that prisoners receive notice when the lawyers abandon the representation. Having given indigent death row inmates

the choice either to go it alone *pro se*, or to rely on whatever free counsel they can find, the State has an "affirmative obligation," *see Bounds*, 430 U.S. at 824, to ensure that prisoners receive *meaningful* notice of deadlines that affect their access to the courts. Once the court clerk learned that Maples' counsel had abandoned their representation of him by leaving their jobs, it could not simply stand idly by.

Had Maples instead proceeded *pro se*, he would have been entitled to direct notice, served on him personally, and the failure to provide such notice would unquestionably be cause to excuse any resulting default.[2] The State of Alabama has chosen to rely largely on out-of-state *pro bono* counsel to fulfill its obligations to ensure meaningful access to the courts. But once the State has knowledge that these counsel have abandoned that obligation in a case, the State has the affirmative obligation to ensure that the prisoner's access continues. At a bare minimum, that includes the obligation to provide Maples with the same notice he would receive if he were proceeding *pro se*. When mail to counsel is returned unopened, the State cannot just put the mail in a drawer and forget about it.

---

[2] *See* Ala. R. Crim. P. 34.5 ("Upon the entry of any order in a criminal proceeding made in response to a motion, other than an order made in open court, the clerk shall, without undue delay, furnish all *parties* a copy thereof by mail or by other appropriate means approved by the judge.") (emphasis added); *Sanders* v. *United States*, 113 F.3d 184, 187 (11th Cir. 1997) ("[W]hen through no fault of his own, a pro se litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court.").

Thus, the State failed to provide the minimum notice required by due process, to correct the record once it knew that the promised notice never occurred, and to discharge its affirmative obligations to ensure meaningful access to the courts. All these factors, taken together, constitute sufficient "external" cause to excuse the procedural default for which Maples himself was indisputably blameless.

II. MAPLES' COUNSEL ABANDONED HIM.

In finding no cause to excuse the procedural default, the Eleventh Circuit relied on the rule that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * *, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Pet. App. 17a (quoting *Coleman*, 501 U.S. at 752). But Maples' habeas claim does not involve the ineffectiveness of his post-conviction counsel in the constitutional sense; his underlying claim is that his *trial* counsel provided such ineffective assistance. His post-conviction counsel provided *no* assistance whatsoever when it was time to appeal.

Coleman held that "'*[s]o long as a defendant is represented by counsel* whose performance is not constitutionally ineffective * * * we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.'" *Id.* at 752 (quoting *Murray* v. *Carrier*, 477 U.S. at 488) (emphasis added). For that important qualification to make sense, a defendant cannot be made to bear the risk of attorney error when his attorney is not actually representing him. Maples' *pro bono* counsel left their law firm, and his local counsel never assumed any responsibility for the representation

from the outset. That is not a mere attorney error. It is abandonment.

In *Holland* v. *Florida*, 130 S. Ct. 2549, 2554 (2010), the Court held that the Eleventh Circuit's rule that even "grossly negligent" attorney conduct could never warrant equitable tolling of the federal habeas limitation period was "too rigid." In that case, there was "a complete breakdown in communication" between a habeas petitioner and his attorney, who had "abandoned" his client, *id.* at 2555, necessitating the client's *pro se* filing of an untimely federal habeas petition. *Id.* at 2559. Finding that "'some extraordinary circumstance stood in his way'" that prevented timely filing, the court excused him from the missed deadline. *Id.* at 2562 (citation omitted).

Justice Alito explained how *Holland*'s reasoning applies to the "cause" issue before the Court here. When an attorney has "effectively 'abandoned'" a habeas petitioner, that "suffice[s] to establish extraordinary circumstances beyond his control" because "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 2568 (Alito, J., concurring) (citing *Coleman*, 501 U.S. at 754). Maples' attorneys provide an even more dramatic and compelling instance of leaving a client "effectively abandoned." His principal counsel did not just figuratively abandon Maples, they literally did so, leaving their jobs and therefore the representation of him. And his local counsel *never* undertook any substantive representation of him. Pet. Br. 10.

The Eleventh Circuit held that "the factor that resulted in Maples' default—namely, counsel's

failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel." Pet. App. 17a. As shown above, the State's own actions were another principal factor that caused the default. But regardless, the Eleventh Circuit's reasoning cannot survive *Holland*. Once counsel had abandoned the representation, Maples' lack of notice—through no fault of his own—became "something external * * * that cannot fairly be attributed to him," that excused the purported default. *Coleman*, 501 U.S. at 753.

The Eleventh Circuit's holding that Maples "cannot establish cause for his default because there is no right to post-conviction counsel," Pet. App. 17a, is completely backward. The lack of a right to post-conviction counsel is a reason why equitable principles demand greater sensitivity to the impact of extraordinary attorney misconduct—not less. In the context of trial-level procedural defaults, this Court has held that "[t]he ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices." *Murray* v. *Carrier*, 477 U.S. at 496. There is less need to employ equitable powers to excuse "sufficiently egregious and prejudicial" trial-level defaults because ineffective assistance claims are available to reach the same result and avoid injustice. *See id.* ("[t]he presence of such a safeguard may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims") (quoting *Reed* v. *Ross*, 468 U.S. 1, 9 (1984)).

In this case, however, the procedural default occurred in part because of egregious and prejudicial conduct by Maples' *post-conviction* attorneys. For that conduct, the safeguard of an ineffective assistance claim is unavailable. Because that critical "safeguard against miscarriages of justice" is absent in the post-conviction context, inflexible application of the procedural default rule for the actions of post-conviction counsel will in fact lead to "unremedied manifest injustices." *Murray*, 477 U.S. at 496. Indeed, just such a manifest injustice will occur in this case if the default engendered by Maples' post-conviction counsel is not excused.

III. EQUITY REQUIRES EXCUSING THE DEFAULT UNDER THESE CIRCUMSTANCES.

Few, if any, reasonable observers would conclude that it is fair or equitable to uphold the application of the death penalty in a case based on a missed deadline, without considering claims that could well save a man's life, simply because his lawyers left their jobs, a mailroom returned letters to them unopened, and the court represented that they were being notified but did nothing when it discovered that the notice was never received. The Court need hold no more than that in order to reverse the Eleventh Circuit's judgment.

"[T]he only writ explicitly protected by the Constitution," habeas corpus is "an area of the law where equity finds a comfortable home." *Holland*, 130 S. Ct. at 2561 (citing *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008)). *See Schlup* v. *Delo*, 513 U.S. 298, 319 (1995) ("Habeas corpus is, at its core, an equitable remedy."); 28 U.S.C. § 2243 (court entertaining habeas petition shall "dispose of the

matter as law and justice require"). The Great Writ "is not now and never has been a static, narrow, formalistic remedy." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

Equitable principles are at the heart of the cause-and-prejudice rule at issue in this case. As the Court has held, it is given the "equitable power to overlook [a] respondent's state procedural default." *Dugger* v. *Adams*, 489 U.S. 401, 410 (1989). Thus, the "cause and prejudice" rule is, at its core, "an equitable exception." *Dretke* v. *Haley*, 541 U.S. 386, 393 (2004). *See McCleskey* v. *Zant*, 499 U.S. 467, 490 (1991) ("A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion."). The "cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke*, 541 U.S. at 393 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984)) (bracketed material in original). "The terms 'cause' and 'actual prejudice' are not rigid concepts," and "[i]n appropriate cases" the principles of comity and finality that underlie the procedural default rule "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982).

This is such a case. Equity and fundamental fairness dictate that a man should not be put to death without consideration of potentially meritorious claims because his lawyers left their firm and the representation without substituting other counsel; a mailroom made no attempt to re-route correspondence to others in the firm; and the court had represented that the lawyers were being

notified, but the clerk did nothing to ensure proper notice when the letters were returned unopened. Regardless of whether these deficiencies constitute a violation of due process or the right of meaningful access to the courts, or whether counsel's abandonment, by itself, would require excusing the default if proper notice had been received, the combination of these factors warrants equitable relief. *See Strickler*, 527 U.S. at 289 ("We need not decide in this case whether any one or two of these factors would be sufficient to constitute cause, since the combination of all three surely suffices.").

Moreover, in considering whether equity requires consideration of the merits of Maples' claims, the Court should not lose sight of what is at stake. "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). In its finality, death is "qualitatively different from a sentence of imprisonment, however long," creating a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). In particular, "[i]n capital cases, it is *constitutionally* required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence." *Sumner* v. *Shuman*, 483 U.S. 66, 72 (1987) (emphasis in original; citation and quotation omitted).

If the procedural default is not excused, no federal court will ever consider the merits of Maples' underlying claims, which allege a litany of failures by his lawyers. Maples' appointed trial counsel had never

previously tried the penalty phase of a capital case. The State called 60 witnesses at trial. JA44. But Maples' counsel were paid a maximum of $1,000 for out-of-court work for each phase of the trial, making it impossible to adequately prepare for cross-examination, rebuttal, or expert witnesses. JA30-31 (citing Ala. Code § 15-12-21 (1975)).

Maples' counsel admitted to the jury that they "'may appear to be stumbling around in the dark.'" Pet. Br. 8 (citation omitted). And they were. Undercutting a diminished capacity defense, counsel told the jury that the case was about Maples' "own actions for which he is responsible." JA33. Although evidence of intoxication could have rebutted the charge of capital murder, Maples' counsel not only failed to present such evidence but objected to and attempted to rebut the State's presentation of such evidence. JA35. No jury instruction was requested on intoxication or the lesser offense of manslaughter. JA39. And counsel undermined both their own and Maples' credibility by pursuing conflicting strategies at the guilt and sentencing phases. During the guilt phase, they argued that "[t]here is no evidence that [Maples] consumed drugs that night." JA37. But during the sentencing phase, they told the jury that there was both alcohol and drug use, JA124, which reflected the actual evidence. JA35-37.

At sentencing, counsel failed to elicit mitigating evidence regarding Maples' tortured upbringing by his birth mother as well as evidence indicating that Maples' birth mother and maternal grandmother probably suffered from mental illness. JA87-88. For example, counsel failed to elicit testimony that Maples' mother tried to choke him, tied him to a chair and beat him with a broom handle, and would

alternatively abandon Maples at times of his life and return with highly erratic behavior. JA89-91.

Particularly given that the jury recommended a death sentence by the bare minimum vote, Pet. Br. 7, it is reasonable to think that Maples' claims of ineffective assistance may have merit. Under the Eleventh Circuit's holding, however, no federal court can review Maples' serious claims of ineffective assistance of counsel at trial because he was the victim of even more egregious misconduct by his attorneys at the post-conviction stage, aggravated by the clerk's failure of notice. That this case involves multiple levels of error, rather than just one, is no reason to ignore those errors when the result literally involves a question of life or death.

The Court need only hold that equity requires excusing the procedural default on the particularly egregious facts of this case. No statute requires a contrary result. And such a case-specific equitable holding will wreak no havoc on the criminal justice system. Defaults engendered by other, less problematic circumstances will still be respected, and no violence will be done to the legitimate principles of finality and comity that animate the procedural default rule. But a failure to do equity in this one case could have broader consequences for the well-deserved perception of our Nation's courts as fair arbiters of justice, a perception that ultimately sustains the authority and legitimacy of the judiciary.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

VIRGINIA E. SLOAN
MARY SCHMID MERGLER
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 580-6920

TIMOTHY LYNCH
ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

Counsel for Amici Curiae

* Counsel of Record

AMICUS CURIAE BRIEF

No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

vs.

KIM T. THOMAS, Commissioner,
Alabama Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
CHRISTINE M. DOWLING
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

In *Coleman* v. *Thompson*, this Court held that a lawyer's error in failing to properly appeal in state habeas proceedings could not constitute "cause" excusing the default. 501 U. S. 722, 757 (1991). Here, Cory Maples failed to properly appeal an adverse order in Alabama state habeas proceedings. This case presents the following question:

Whether the Eleventh Circuit properly held that Maples had not established cause to excuse his procedural default where Maples's team of attorneys was actively representing him at the time of the default, where the clerk delivered a copy of the court's order to one of Maples's attorneys of record, and where the mistakes of Maples's attorneys caused the default.

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

The Court should not alter the balance struck by Congress 5

A. Procedural default before AEDPA 6

B. Congress strikes a new balance 11

C. The overcomplex procedural default rule . 15

II

The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress 17

III

There is no miscarriage of justice in this case 24

A. The relevance of innocence 24

B. Justice in the present case 28

Conclusion 31

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U. S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) 30

Avery v. Georgia, 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953) 16

Bousley v. United States, 523 U. S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) 25

Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) 6, 7, 8

Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) 6, 9, 10, 11

Cullen v. Pinholster, 563 U. S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) 14

Davis v. United States, 411 U. S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216 (1973) 8

Dretke v. Haley, 541 U. S. 386, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) 13

Enmund v. Florida, 458 U. S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) 30

Ex parte Maples, 758 So. 2d 81 (Ala. 1999) 2

Ex parte McWhorter, 781 So. 2d 330 (Ala. 2000) .. 29

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) 8

Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) 12

Francis v. Henderson, 425 U. S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976) 8

Harrington v. Richter, 562 U. S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) 12, 14, 15

Herrera v. Collins, 506 U. S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) 26

Holland v. Florida, 560 U. S. __, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) 6

House v. Bell, 547 U. S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) 13, 26

In re Davis, 557 U. S. __, 130 S. Ct. 1, 174 L. Ed. 2d 614 (2009) 26

In re Davis, No. CV409-130, 2010 U. S. Dist. LEXIS 87340 (Aug. 24, 2010) 26

Kaufman v. United States, 394 U. S. 217, 89 S. Ct. 1068, 22 L. Ed. 2d 227 (1969) 24

Keeney v. Tamayo-Reyes, 504 U. S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) 13

Kuhlmann v. Wilson, 477 U. S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) 25

Lonchar v. Thomas, 517 U. S. 314, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) 12

Maples v. Alabama, 543 U. S. 1148, 125 S. Ct. 1309, 161 L. Ed. 2d 110 (2005) 4

Maples v. Allen, 586 F. 3d 879 (CA11 2009) 4

Maples v. State, 758 So. 2d 1 (Ala. Crim. App. 1999) 2

McCleskey v. Zant, 499 U. S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) 12, 25

Montana v. Egelhoff, 518 U. S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) 29

Murray v. Carrier, 477 U. S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) 9, 26

Murray v. Giarratano, 492 U. S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) 12, 18, 23

O'Sullivan v. Boerckel, 526 U. S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) 13

Pennsylvania v. Finley, 481 U. S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) 12

Premo v. Moore, 562 U. S. ___, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) 28

Roper v. Simmons, 543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) 30

Sawyer v. Whitley, 505 U. S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) 16, 26, 27

Smith v. Murray, 477 U. S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) 9

Spears v. Stewart, 283 F. 3d 992 (CA9 2002) 21

Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) 25

Strickler v. Greene, 527 U. S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) 16

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 6, 25

Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) 24

Tuilaepa v. California, 512 U. S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) 30

Wainwright v. Sykes, 433 U. S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) 8, 13

Walker v. Martin, 562 U. S. __, 131 L. Ed. 2d 1120, 179 L. Ed. 2d 62 (2011) 16

Whorton v. Bockting, 549 U. S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) 25

Williams (Michael) v. Taylor, 529 U. S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) 13

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 11

Withrow v. Williams, 507 U. S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) 25

Wright v. West, 505 U. S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) 7

United States Statutes

28 U. S. C. § 2243 24

28 U. S. C. § 2244 ..... 12, 14, 26

28 U. S. C. § 2254 ..... 12, 13, 14

28 U. S. C. § 2261 12

28 U. S. C. § 2264 13

28 U. S. C. § 2265 22

28 U. S. C. § 2266 ..... 21, 22

Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 11

USA PATRIOT Improvement and Reauthorization Act of 2005, 120 Stat. 192 (2006) 21

Secondary Sources

American Bar Association, Toward a More Just and Effective System of Review State Death Penalty Cases: Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (Oct. 1989) 18, 19

Blackstone, W., Commentaries (1st ed. 1769) 29

Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011) 22

Conference Report, Terrorism Prevention Act, H. R. Conf. Rep. No. 104-518 (1996) 11

Congressional Record 20, 22

Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess. (1995) 20

Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 24

Garvey, Aggravation and Mitigation in Capital Cases, What Do Jurors Think?, 98 Colum. L. Rev. 1538 (1998) 30

Habeas Corpus Reform, Hearings before the Committee on the Judiciary, 101st Cong., 1st & 2d

Sess. (Nov. 8, 1989 & Feb. 21, 1990) (S. Hearing 101-1253) 19, 20, 21

Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, reprinted in 135 Cong. Rec. 24694 (1989) 12, 13, 18

King, N., & Hoffman, J., Habeas for the Twenty-First Century (2011) 15, 16

Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1 (1984) 29

Newport, In U. S., 64% Support Death Penalty in Cases of Murder (Gallup, Nov. 8, 2010) 27

Quinnipiac University, Death Penalty Support At New High In Connecticut, Quinnipiac University Poll Finds (Mar. 10, 2011), available at http://www.quinnipiac.edu/x1296.xml?ReleaseID=1566 27

Scheidegger, Death Penalty Support At New High In Connecticut, Crime and Consequences Blog, Mar. 11, 2011, available at http://www.crimeandconsequences.com/crimblog/2011/03/death-penalty-support-at-new-h.html 27

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

vs.

KIM T. THOMAS, Commissioner,
Alabama Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. The parties have filed blanket consents.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, the petitioner seeks to reopen litigation of a murder he undisputedly committed 15 years ago. He wants to litigate over again claims already considered and rejected on the merits. In the process, he seeks to evade rules established long ago by this Court and relied on by Congress when it overhauled the law of habeas corpus. Such a result would cause further delay in the execution of judgments which are already long overdue. This consequence would be contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

After an evening of drinking, playing pool, and riding around with acquaintances Stacy Allen Terry and Barry Dewayne Robinson II in Morgan County, Alabama, Petitioner Cory Maples shot each man twice in the head at close range with a .22 caliber rifle. *Maples* v. *State*, 758 So. 2d 1, 14-15 (Ala. Crim. App. 1999). Maples fled in Terry's car and was later apprehended in Nashville. *Id.*, at 15. He signed a confession and was subsequently convicted of two counts of capital murder and sentenced to death. *Id.*, at 14. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and death sentence. *Id.*, at 81; *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999).

The events most important to the procedural default issue in this case occurred on this timeline:

September 2000: Clara Ingen-Housz and Jaasi Munanka, associates at Sullivan & Cromwell ("S&C") become involved in the case. See App. to Pet. for Cert. 257a.

July 24, 2001: State collateral relief petition filed in trial court. J. A. 22-24.

Summer 2001: S&C partner Marc De Leeuw becomes "involved in this case." App. to Pet. for Cert. 257a.

December 7, 2001: Amended petition filed. J. A. 28-142. The signature page lists Ingen-Housz, Munanka, and local counsel John Butler as counsel.

December 17, 2001: Ingen-Housz and Munanka receive the trial court's order denying the motion to dismiss. "Thereafter, the lawyers working on this case for Mr. Maples prepared for the evidentiary hearing requested in the Rule 32 Petition." See App. to Pet. for Cert. 258a.

Summer 2002: Associates Ingen-Housz and Munanka leave S&C. J. A. 258a. Although partner De Leeuw and other S&C attorneys are now working on the case, no one notifies the trial court of a change of attorneys or address.

2001-2003: "Mr. Maples periodically met with his lawyers." J. A. 257.[2]

May 22, 2003: The trial court reconsiders its denial of the motion to dismiss and enters an order granting the motion. J. A. 146-225. Copies are mailed to Ingen-Housz and Munanka in New York and Butler in Alabama.

Shortly after May 22, 2003: Butler receives his copy of the order and does nothing. App. to Pet. for Cert. 256a. S&C's mail room returns the copies addressed to Ingen-Housz and Munanka to the court. See App. to Pet. for Cert. 258a.

July 7, 2003: Time to appeal the state trial court's order expires. Brief for Respondent 9.

---

2. It would be helpful to know specifically who he met with and when. *Amicus* CJLF has inquired about prison visitor logs and been told they are not retained that far back.

August 13, 2003: The Alabama Attorney General advises Maples of the expiration of time to appeal in order to enable him to meet the federal habeas deadline. App. to Pet. for Cert. 253a-254a. S&C lawyers working on the case learn of the dismissal order after Maples calls his mother who calls S&C. App. to Pet. for Cert. 258a.

Maples sought relief in the state courts, which was denied. See App. to Pet. for Cert. 222a (Circuit Court), 226a (Court of Criminal Appeals), 237a (Supreme Court). This Court denied certiorari. *Maples* v. *Alabama*, 543 U. S. 1148 (2005).

On federal habeas, the District Court denied relief, finding that the ineffective assistance claims in the state collateral petition were procedurally defaulted. The District Court granted a certificate of appealability on this issue alone, and the Court of Appeals affirmed. See *Maples* v. *Allen*, 586 F. 3d 879, 883 (CA11 2009) (*per curiam*).

Maples petitioned for a writ of certiorari raising two questions: (1) the adequacy of Alabama's procedural default rule, and (2) whether Maples had "cause" for his default. Pet. for Cert. i. This Court granted certiorari on March 21, 2011, limited to the second question.

SUMMARY OF ARGUMENT

When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it decided to shift the balance in habeas corpus away from the extensive relitigation of state criminal cases and toward a more limited review. The procedural default rules in effect at that time, including *Coleman* v. *Thompson*, were part of the canvas on which Congress painted AEDPA. Even though most of the procedural

default law was not codified, courts should not change it in a manner that will shift the balance to a point different from the one that Congress chose.

Several briefs in this case raise the issue of the State of Alabama's lack of a formal mechanism guaranteeing appointed counsel in state collateral review in capital cases. Congress has already acted to address this specific problem, based on a recommendation of a committee of the Judicial Conference chaired by Justice Powell. This solution has not worked to date because it has been obstructed, in large part by the very federal courts that were supposed to enforce it. The correct response of the judicial branch of government is to implement the solution Congress enacted. The judiciary should not make up its own solution, and it should definitely not impose the solution Congress considered and rejected—depriving states of the procedural default defenses previously in effect.

In some circumstances, this Court has made exceptions to procedural rules in habeas corpus to correct a miscarriage of justice. This case does not call for making new exceptions, because there has been no miscarriage. Cory Maples committed a callous crime. He gunned down two people who had been his friends for no good reason and apparently just to steal their car and money. He received a just sentence for this crime.

ARGUMENT

I. The Court should not alter the balance struck by Congress.

In 1996, Congress examined the state of the law of habeas corpus, particularly in capital cases, and enacted the landmark reform in title I of the Antiterrorism and Effective Death Penalty Act of 1996. This law was not

enacted in a vacuum. It was enacted in the context of a large body of case law, especially the decisions of this Court. Congress changed some aspects of that case law, codified some, and left some standing.

An important, and controversial, aspect of that case law was this Court's decision in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). This Court has recently described *Coleman* as holding "*without qualification*, that a petitioner must bear the risk of attorney error." *Holland* v. *Florida*, 560 U. S. __, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130, 146 (2010) (quoting *Coleman*, *supra*, at 752-753) (emphasis added) (internal quotation marks omitted).

Petitioner and supporting *amici* now ask this Court to alter the balance struck by Congress. *Amicus* NAACP is the most candid, expressly asking the Court to shift procedural default law by modifying or even overruling its precedents in reaction to the congressional reforms. See Brief for NAACP Legal Defense and Education Fund as *Amicus Curiae* 7-10, 23-30 ("NAACP Brief"). Petitioner seeks a similar result but cloaks the request in creative interpretations of the Court's precedents. See Brief for Petitioner 35-39 (trying to get around *Coleman*'s unqualified holding). Either way, the request should be rejected.

A. *Procedural Default Before AEDPA*

The development of the law of habeas corpus has been uneven, to put it mildly. See *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (plurality opinion) (quoting *Fay* v. *Noia*, 372 U. S. 391, 411-412 (1963)). The procedural default doctrine has been a major part of that unevenness.

Brown v. *Allen*, 344 U. S. 443 (1953), is the case widely understood to have established the rule that

federal habeas courts would review *de novo* questions of law already decided by the state courts. See *Wright* v. *West*, 505 U. S. 277, 287-289 (1992) (plurality opinion); *id.*, at 300-301 (O'Connor, J., concurring in the judgment) (discussing *Brown* and its interpretation). In the companion case of *Daniels* v. *Allen*, though, counsel filed required papers for the appeal to the North Carolina Supreme Court a day late, and the appeal was stricken as untimely. See 344 U. S., at 484-485.

The Court noted that habeas is not to be used in lieu of an appeal, but that habeas relief would be available where the defendant was unable to appeal "because of lack of counsel, incapacity, or some interference by officials." *Id.*, at 485-486. Absent such circumstances, failure to appeal barred habeas relief the same as other well-established forms of default. See *id.*, at 486, and n. 35 (citing *Darr* v. *Burford*, 339 U. S. 200, 203 (1950); *Ex parte Spencer*, 228 U. S. 652, 660 (1913); *In re Wood*, 140 U. S. 278 (1891)).

> "Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 447, *supra*, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above . . . , bars federal habeas corpus. *The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*" 344 U. S., at 486-487 (emphasis added).

Brown/Daniels thus simultaneously expanded the scope of habeas review and boosted the importance of the procedural history of the case in state court. The procedural default rule was an aspect of the exhaustion rule. As with the statutory exhaustion rule, see *id.*, at 462-463, n. 17, the exceptions to exhaustion are for external forces that make the state remedy ineffective. The error of a represented defendant's attorney, even such an obvious and egregious one as missing a clear, jurisdictional deadline, is not sufficient.

The *Daniels* portion of *Brown* was effectively overruled ten years later in *Fay* v. *Noia*, 372 U. S. 391, 411-412 (1963) (Clark, J., dissenting). Procedural default was limited to an equitable theory where the petitioner's own conduct has disentitled him to relief. See *id.*, at 438. This was further refined to a test of whether the petitioner "has deliberately by-passed the orderly procedure of the state courts . . . ." See *ibid.*

Noia itself was undermined in a series of decisions in the mid-1970s. In *Davis* v. *United States*, 411 U. S. 233, 234-236 (1973), a federal defendant sought to use *Noia* to get around the requirement of Federal Rule of Criminal Procedure 12(b)(2), that an objection to the composition of the grand jury must be raised before trial, unless cause for raising it later was shown. The Court found it "inconceivable" that Congress could have intended 28 U. S. C. § 2255 to allow such an easy circumvention of a rule that Congress had "adopted." *Davis*, *supra*, at 241-242. The dissent protested that this was contrary to *Noia*, see *id.*, at 245 (Marshall, J., dissenting), and so it was. *Francis* v. *Henderson*, 425 U. S. 536, 539-541 (1976), relied heavily on *Davis* in a state prisoner case. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), adopted the cause and prejudice test as a

general rule, rejecting "the sweeping language of *Fay* v. *Noia*."[3]

The *Sykes* rule was applied to a claim omitted from an appeal in *Murray* v. *Carrier*, 477 U. S. 478 (1986). Such an omission can be "cause" if it is "constitutionally ineffective," if the claim "was not reasonably available to counsel," or if there is interference by the state. See *id.*, at 488. Mere "ignorance or inadvertence" is not sufficient. See *id.*, at 491.[4] *Carrier* is also significant for its explicit recognition of actual innocence as a free-standing exception to the procedural default rule, discussed further in Part III, *infra*.

The *Sykes* rule was applied to an attorney's negligent missing of an appeal deadline in state collateral review in *Coleman* v. *Thompson*, *supra*. The facts of *Coleman* are strikingly similar to the present case. Following his trial, sentence of death, and direct appeal, Coleman was represented in state habeas by lawyers from one of America's premier law firms, Arnold & Porter. See Joint Appendix in *Coleman* v. *Thompson*, No. 89-7662, p. 31. Following denial of the habeas petition on the merits by the trial court, *id.*, at 16-19, Coleman's lawyers appealed three days late because they had made an unwarranted assumption about the date of the judgment. See *id.*, at 32-33; see also *Cole-*

---

3. A more complete history of the rule is presented in Part II-A of CJLF's brief in *Baldwin* v. *Reese*, No. 02-964, available at http://www.cjlf.org/briefs/Reese.pdf.

4. A perfectly valid reason for omitting a claim is that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983)). This is as true in capital cases, which *Smith* was, as in noncapital ones.

man, 501 U. S., at 727, 752. Regarding Coleman's claim of attorney negligence as cause, the Court clearly conditioned such a claim on a constitutional right to effective counsel in the proceeding at issue.

> "Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987); *Murray* v. *Giarratano*, 492 U. S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright* v. *Torna*, 455 U. S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must 'bear the risk of attorney error that results in a procedural default.'" 501 U. S., at 752-753.

There is, to be sure, some discussion of agency law in a makeweight argument. See *id.*, at 753-754. However, in conclusion the *Coleman* Court unequivocally limited attorney error as "cause" to those proceedings in which there is a constitutional right to counsel.

> "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the

> petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. *In the absence of a constitutional violation*, the petitioner bears the risk in federal habeas for *all* attorney errors made in the course of the representation,[5] as *Carrier* says explicitly." *Id.*, at 754 (emphasis added).

This was the state of the law when Congress enacted the landmark habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

B. Congress Strikes a New Balance.

Title I of AEDPA is habeas corpus reform. "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." Conference Report, Terrorism Prevention Act, H. R. Conf. Rep. No. 104-518, p. 111 (1996). This goal must be kept in mind when interpreting the statute, see *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000), but it should also be kept in mind when a proposal is made to alter a part of the case law that Congress chose not to change. When Congress acts to reduce a source of delay, courts should not react by creating new sources or expanding other old ones. Congress believed that the body of habeas law prior to AEDPA allowed too much litigation in review of state criminal convictions (and to some degree federal ones), and it acted to shift the balance.

---

5. As the timeline in the Summary of Facts and Case, *supra*, shows, Maples was actively represented by counsel at all relevant times. The errors made by DeLeeuw *et al.* are clearly "in the course of the representation."

Several of the changes made by Congress are bars to relitigation. A limit on successive petitions was already in place under *McCleskey* v. *Zant*, 499 U. S. 467, 492 (1991), but Congress raised the bar in 28 U. S. C. § 2244(b). This limitation is a "modified res judicata rule." *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Paragraph (1) bars claims that were litigated in federal court on the first petition, and paragraph (2) bars most claims that could have been but were not litigated on the first petition. The most controversial change, § 2254(d)[6], is a rule of the same general type. "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington* v. *Richter*, 562 U. S. __, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624, 638 (2011).

Congress also strengthened other limitations on habeas corpus. The exhaustion rule was fortified by limiting waiver of it to express waivers. See § 2254(b)(3). A statute of limitations replaced the previous amorphous timeliness rule. Compare § 2244(d), with *Lonchar* v. *Thomas*, 517 U. S. 314, 327-328 (1996).

A new limitation on substantive grounds for habeas relief reinforced the decisions of this Court in *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), and *Murray* v. *Giarratano*, 492 U. S. 1 (1989). In the report that proposed what eventually became Chapter 154, the Powell Committee recommended substantially the language that became 28 U. S. C. § 2261(e). See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 10 (Powell Committee),

---

6. Section numbers refer to title 28, United States Code, unless otherwise indicated.

reprinted in 135 Cong. Rec. 24694, 24696, col. 1 (1989). This language is expressly based on the holdings of *Finley* and *Giarratano* that there is no constitutional right to counsel in collateral review, and death is not different in this regard. See Powell Committee 13, 135 Cong. Rec., at 24696, col. 3. Congress copied the same language in § 2254(i) to ensure it applied to cases not subject to Chapter 154.

For the most part, Congress chose not to alter the law of procedural default in AEDPA. New § 2254(e)(2) is partly a codification of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992), and partly a raising of its bar. See *Williams* (*Michael*) v. *Taylor*, 529 U. S. 420, 433 (2000). Also, Congress repealed the former subdivision (d) that had formed the basis of the *Tamayo-Reyes* dissent. See 504 U. S., at 20 (O'Connor, J., dissenting). The new Chapter 154 has a separate default rule for cases subject to that chapter. See § 2264(a). With these exceptions, Congress left the procedural default doctrine as it existed in case law when AEDPA was adopted. See, *e.g.*, *House* v. *Bell*, 547 U. S. 518, 539 (2006) (standard for actual innocence unchanged).

The fact that Congress did not codify the rules of *Sykes*, *Coleman*, and other procedural default cases does not mean that this Court should exercise the same latitude in modifying the case law as it exercised before AEDPA. See., *e.g.*, *Sykes*, 433 U. S., at 81. Those cases are threads in the overall fabric, and any substantial alteration risks contradicting the policy decisions made by Congress when it enacted AEDPA.

Although the procedural default rule is no longer part and parcel of the exhaustion rule, the two remain closely connected. *Dretke* v. *Haley*, 541 U. S. 386, 392 (2004), described the default rule as a "corollary to the habeas statute's exhaustion requirement." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999), noted the default

rule's importance in protecting against evasion of the exhaustion requirement. Given that Congress chose to strengthen the exhaustion rule, any proposal to weaken a corollary rule needed to prevent its evasion must be regarded with caution.

Along with protecting the exhaustion rule from evasion, the procedural default rule now has an additional function of protecting the § 2254(d) bar to relitigation from evasion. Obtaining a state-court ruling on the merits is no longer just a box to be checked as a condition to entering the federal courthouse. After AEDPA, a state-court decision on the merits has a profound effect on *how* the federal court approaches the case. The question of whether one of the two statutory exceptions to the relitigation bar applies, see *Richter*, 131 S. Ct., at 784, 178 L. Ed. 2d, at 638, is a threshold question, decided solely on the record before the state court. See *Cullen* v. *Pinholster*, 563 U. S. __, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557, 570 (2011). "This understanding of the text is compelled by 'the broader context of the statute as a whole,' which demonstrates Congress' intent to channel prisoners' claims first to the state courts." *Id.*, 131 S. Ct., at 1398-1399, 178 L. Ed. 2d, at 570.

The procedural default rule and § 2254(d) complement each other in much the same way that the two paragraphs of § 2244(b) complement each other. In the case of a successive federal petition, § 2244(b)(1) bars the claims that were made before, and § 2244(b)(2) bars claims that were not made before unless an exception applies. The first federal petition is "successive" to the petition made in state court; § 2254(d) bars the claims adjudicated on the merits in state court, with two exceptions, while the procedural default rule bars those that were not, also with two exceptions. These two rules, applied properly and in conjunction, would

achieve the goal of reserving federal habeas as a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 131 S. Ct., at 786, 179 L. Ed. 2d, at 641 (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Both the § 2254(d) standard and its broader purpose would be frustrated by an expanded definition of what constitutes "cause" for bringing to the federal court a claim not adjudicated on the merits in state court.[7]

C. The Overcomplex Procedural Default Rule.

Along with respect for the balance struck by Congress, there is an additional, practical reason not to add another wrinkle to the law of procedural default. It is too complex already. The question of whether a claim is barred by failure to assert it in state court in accordance with state rules should be a straightforward one. The rule should expedite federal habeas cases by reducing the claims to be decided to only those decided in state court, most of which should be dismissed at the threshold under § 2254(d) as interpreted in *Richter* and *Pinholster*.

The procedural default rule is riddled with exceptions, and these exceptions have produced much unproductive litigation. See N. King & J. Hoffman, Habeas for the Twenty-First Century 77-78 (2011). The decision to place the procedural default rule within the independent state grounds doctrine imported into habeas the very confused jurisprudence of when a state

---

7. In the present case, there was an adjudication on the merits in the state trial court, but petitioner's proposal would apply even in cases where there was not and must be evaluated on that basis.

rule is "adequate." See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris* v. *Williams*, No. 07-1216, pp. 8-13. That confusion made it very easy to evade the procedural default rule for those who are of a mind to evade, cf. *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953), and some federal courts launched wasteful and pointless investigations of the homogeneity of state procedural rulings. See Brief for California *et al.* as *Amici Curiae* in *Beard* v. *Kindler*, No. 08-992, pp. 23-25.

The worst of the abuses should be curbed by the decision last term in *Walker* v. *Martin*, 562 U. S. __, 131 L. Ed. 2d 1120, 1127-1130, 179 L. Ed. 2d 62, 71-74 (2011), but many opportunities to litigate whether an omitted claim is barred by procedural default remain. There is the vaguely defined "exorbitant application" exception. See *id.*, 131 S. Ct., at 1128, 179 L. Ed. 2d, at 71, n. 4. There is the perennial assertion of ineffective assistance as cause. See King & Hoffman, *supra*, at 78. There are nondisclosure of evidence cases where the cause and prejudice inquiry largely merges with the merits of the claim. See *Strickler* v. *Greene*, 527 U. S. 263, 282 (1999).

The exception that causes the least difficulty in practice is the most clearly necessary one—the actual innocence exception. It causes little difficulty because this Court has limited it to cases of innocence of the offense or ineligibility for the punishment and categorically excluded disputes over discretionary sentencing choices. See *Sawyer* v. *Whitley*, 505 U. S. 333, 347 (1992). Most habeas petitioners are so clearly guilty of the offense and eligible for the punishment that few can even raise a litigable issue under this exception.

Claims of ineffective assistance as cause have been far more problematic, but they have at least been held in check by what has been understood to date as the

bright-line rule of *Coleman*—ineffective assistance as "cause" stops where the constitutional right to counsel stops. Petitioner now seeks to replace the bright-line rule with a fuzzy "abandonment" inquiry. The primary vice of the proposal lies not in the vanishingly small number of cases where such a claim would actually be valid but in the much larger number of cases where a lawyer could craft a claim of abandonment sufficiently plausible to litigate even though ultimately found meritless. Indeed, the present case has come all the way to this Court on certiorari even though the claim of abandonment shrivels upon close inspection. See Brief for Respondent 37-55.

Further complication of the already overcomplex procedural default rule would require compelling justification. There is none in this case, as we will discuss in Part III. First, though, it is necessary to discuss the contention that this Court should reconsider long-settled precedent to address the way Alabama handles appointment of collateral counsel in capital cases. The simple answer is that Congress has already decided how to address this problem, and the duty of the judicial branch is to implement the solution already enacted, something it has failed to do for 15 years.

II. The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress.

Petitioner and *amici* bemoan the fact that the State of Alabama has no formal mechanism for appointing state collateral counsel in capital cases. See Brief for Petitioner 3-6; Brief for Alabama Appellate Court Justices and Bar Presidents as *Amici Curiae* 17-19; Brief for National Association of Criminal Defense Lawyers, American Civil Liberties Union, and ACLU of

Alabama as *Amici Curiae* 22-24. Little of what they say is new. What is remarkable about these briefs is what they fail to mention. The Congress of the United States has already enacted legislation to specifically address this exact problem.

In *Murray* v. *Giarratano*, 492 U. S. 1, 3 (1989), "[t]he courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief." This Court reversed. Concurring in that judgment, Justice Kennedy explained,

> "Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. See 134 Cong.Rec. 33237 (1988) (providing for expedited consideration of proposals of the Judicial Conference committee).
>
> "Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us." *Id.*, at 14.

Those committees did deliver their reports soon thereafter. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) ("Powell Committee"), reprinted in 135 Cong. Rec. 24,694 (1989); American Bar Association, Toward a More Just and Effective System of Review

State Death Penalty Cases: Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (Oct. 1989) ("ABA Report").

While both reports recognized that appointment of qualified counsel in state proceedings was a key reform, the two proposals offered very different approaches to achieve that. The ABA would threaten states with a stick. The federal government would impose "specific mandatory standards." ABA Report 15. A state that failed to comply would lose some of the protections it had under the law of that time.

> "To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding in which the state court, in deprivation of the right to counsel, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner: exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact." *Id.*, at 16.

Yet the state could appoint the best attorney in the world and pay him lavishly and still be stuck with the consequences of his error under this proposal. "Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel . . . . " *Ibid.*

The Powell Committee approach was to offer a carrot rather than a stick. The proposal was optional with the states. Habeas Corpus Reform, Hearings

before the Committee on the Judiciary, 101st Cong., 1st & 2d Sess., 42 (Nov. 8, 1989 & Feb. 21, 1990) (S. Hearing 101-1253) (statement of Justice Powell). In return for adopting an appointment of counsel mechanism, review of capital cases would be reduced to "one fair and complete course of collateral review through the state and federal systems." *Id.*, at 41. This would be achieved by, among other reforms, a strict limit on successive petitions. See *id.*, at 42.

The Powell Committee proposal was introduced by Senator Thurmond as S. 1760. The ABA proposal, as such, was a nonstarter. The Democratic alternative to the Thurmond bill, S. 1757 by Senator Biden, was the Powell Committee proposal amended by inserting some key elements lifted from the ABA proposal. Most pertinent of these for the present case was the "ignorance or neglect" exception to procedural default quoted above, a proposal that would have gutted this Court's procedural default jurisprudence. See S. Hearing 101-1253, at 46, and n. 6 (statement of Justice Powell).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitations for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995).

In the Senate, the provisions for an effective death penalty were ultimately consolidated with antiterrorism provisions in S. 635 and enacted as the Antiterrorism and Effective Death Penalty Act of 1996. As enacted, some of the provisions of the Powell Committee proposal, including the strict limit on successive petitions, applied to all habeas cases. Additional incentives were

added to the new Chapter 154 to encourage states to opt in by providing the appointment of counsel mechanisms. Among these were time limits to ensure that the reforms really would speed up the process, see 28 U. S. C. § 2266, a feature that the Powell Committee had decided to omit. See S. Hearing 101-1253, at 42 (statement of Justice Powell).

The incentive approach initially succeeded in encouraging some states to adopt appointment of counsel mechanisms, but it utterly failed in its delay-reducing goal due to a hostile reception by the federal courts charged with enforcing it. *Spears* v. *Stewart*, 283 F. 3d 992 (CA9 2002), exemplifies the problem. In response to Congress's promise of expedited federal review, the State of Arizona established a mechanism for the appointment of counsel. See *id.*, at 1009. After concluding, correctly, that Arizona's mechanism complies with all of the requirements that appear in the text of the statute, see *id.*, at 1012-1016, the Ninth Circuit claimed to find an additional requirement of timeliness of appointment that appears nowhere in the text. See *id.*, at 1016-1017. Arizona was denied the promised benefit of Chapter 154 even though it had done everything the text of the statute requires. With the promised reward snatched away by the federal courts, the states that had not yet created appointment of counsel mechanisms, including Alabama, no longer had the incentive that Congress had intended.

Congress reacted to *Spears* and other decisions in the USA PATRIOT Improvement and Reauthorization Act of 2005, 120 Stat. 192 (2006). By making significant revisions to Chapter 154, Congress demonstrated its determination to see this dormant law implemented. The time limit on District Court adjudication was expanded from 180 days to 450 days in recognition that the earlier limit may have been too severe. See

§ 2266(b)(1)(A). The requirements to qualify for the chapter were expressly limited to those stated in the text, § 2265(a)(3), for the specific purpose of abrogating *Spears*. See 152 Cong. Rec. 2445-2446 (2006) (statement of Sen. Kyl). The decision as to whether a state is qualified was removed from the habeas court, with its conflict of interest, and given to the Attorney General of the United States with review by the Court of Appeals for the District of Columbia Circuit, the one circuit that does not hear habeas petitions from state prisoners. See *ibid.*; § 2265.

Although enacted five years ago, the revised Chapter 154 has not been implemented to date because of an inordinate delay in promulgating the implementing regulations. See § 2265(b). There are multiple reasons for that delay, but it should be near an end. A revised set of regulations has been published in the Federal Register. See Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011). The comment period ended June 1, 2011.

Although Congress has twice decided that the policy will be to offer states a carrot and not a stick to encourage appointment of state collateral counsel, Petitioner and supporting *amici* urge this Court to apply the stick that Congress rejected. The *amici* appellate justices and bar presidents bemoan the failure to enact reforms in the Alabama Legislature. See Brief for Alabama Appellate Court Justices and Bar Presidents as *Amici Curiae* 17-19. The NACDL and ACLU castigate Alabama's supposed "intransigence." Brief for National Association of Criminal Defense Lawyers, American Civil Liberties Union, and ACLU of Alabama as *Amici Curiae* 22-24. The thrust of all this is to urge this Court to address the problem by expanding the cause and prejudice exception to the procedural default rule, allowing the exception in a case indistinguishable from

Coleman. The ABA recommended that course, Congress considered that course, and Congress rejected that course.

If it was not proper for this Court to craft its own solution to this specific problem while Congress was considering the question, *Murray* v. *Giarratano*, 492 U. S., at 14 (Kennedy, J., concurring in the judgment), it would be even less proper for this Court to craft its own solution after Congress has enacted one. It would be still more improper for this Court's solution to be along the lines of the one that Congress considered and rejected.

The judiciary does indeed have a role in fixing the problem of appointment of counsel for state collateral review in capital cases. That role is to promptly implement the solution enacted by Congress. As soon as the administrative portion of that process is completed, which should be soon, the D. C. Circuit and this Court should complete their portion of the qualification process expeditiously, and the habeas courts should then implement Chapter 154 faithfully and not grudgingly for those states that qualify.

When capital cases are completed and executions carried out in the time frames specified in Chapter 154, supporters of capital punishment in the states that have not yet established appointment mechanisms will give their enthusiastic support to the needed legislation. That is the solution that Congress enacted, and that is the solution that the judiciary should implement.

III. There is no miscarriage of justice in this case.

A. The Relevance of Innocence.

The habeas statute has long required the court to "dispose of the matter as law *and justice* require." 28 U. S. C. § 2243 (emphasis added). The law in this case, as explained in Parts I and II of this brief and the Brief for Respondent, requires application of the procedural default rule. Given the tone of the briefs of the petitioner and supporting *amici*, it is worth saying a few words about the justice as well.

In the 1960s, it appeared to many that habeas corpus, along with the statutory substitute for federal prisoners, was about procedure and only procedure. Criminals could litigate their claims under the Fourth Amendment exclusionary rule on habeas corpus the same as they could on direct review, despite the complete absence of any question of guilt or even any unfairness in the procedure for determining guilt. See, *e.g.*, *Kaufman* v. *United States*, 394 U. S. 217, 228-229 (1969). On the other hand, newly discovered evidence of innocence, as such, was not a ground for habeas relief, even in a capital case. See *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963).

That is how it was, but not everyone agreed that was how it should be. Justice Black argued in *Kaufman*, "In collateral attacks . . . , I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." 394 U. S., at 242 (dissenting opinion). Judge Friendly expanded upon this proposal in his famous law review article the next year. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970) ("colorable claim of factual innocence").

The evolution of the law of habeas corpus since then has been largely in the direction of increasing the relevance of innocence, albeit slowly and in small steps. *Stone* v. *Powell*, 428 U. S. 465, 494, 495 (1976), accepted in part the argument rejected in *Kaufman* and treated Fourth Amendment claims as categorically different from other claims. Due to the absence of any impact on the accuracy of the guilt verdict, state court decisions rejecting Fourth Amendment claims no longer needed to be reconsidered in federal court. *Id.*, at 491, n. 31 ("no bearing on the basic justice"). *Withrow* v. *Williams*, 507 U. S. 680 (1993), declined to extend *Stone* v. *Powell* to *Miranda* claims, but only after concluding that *Miranda* claims do sometimes impact the reliability of the guilt verdict. See *id.*, at 692.

In modern retroactivity doctrine, substantive changes in the law that render the defendant innocent of the crime or ineligible for the punishment apply retroactively on habeas corpus. See *Bousley* v. *United States*, 523 U. S. 614, 620-621 (1998). Procedural changes do not, with a theoretical exception for watershed changes with a powerful impact on the truth-determining the function of the trial. *Teague* v. *Lane*, 489 U. S. 288, 313 (1989) (plurality opinion). No new rule created since 1989 has qualified for that exception for the simple reason that all such changes were recognized long before. See *Whorton* v. *Bockting*, 549 U. S. 406, 417-418 (2007).

Judge Friendly's proposal was accepted for the limited purpose of successive petitions by a plurality in *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986). The proposal was not accepted by a majority, however, and it was subsequently supplanted by the cause and prejudice test in *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991). *McCleskey* itself was supplanted by AEDPA, requiring either a retroactive new rule (in practice, a

substantive rule) or a specific type of cause plus actual innocence. See 28 U. S. C. § 2244(b)(2).

The *Townsend* dictum that innocence alone is never a ground for habeas relief has come into question three times in this Court, but it has not yet been necessary to definitively resolve the question. The issue was first taken up in *Herrera* v. *Collins*, 506 U. S. 390 (1993), but upon a closer examination of the facts it became apparent that Herrera was guilty as sin. See *id.*, at 421 (O'Connor, J., concurring). The issue also arose in *House* v. *Bell*, 547 U. S. 518 (2006), but again it was unnecessary to resolve it. House had made a sufficient showing of innocence to avoid the procedural default for his underlying constitutional claim, discussed below. See *id.*, at 554-555. Finally, in *In re Davis*, 557 U. S. __, 130 S. Ct. 1, 174 L. Ed. 2d 614 (2009), this Court took the extraordinary step of transferring an original habeas petition to the District Court for hearing. However, upon hearing the evidence it became apparent that Davis, like Herrera, is truly guilty. *In re Davis*, No. CV409-130, 2010 U. S. Dist. LEXIS 87340, *217 (Aug. 24, 2010), appeal dismissed in *Davis* v. *Humphrey*, 131 S. Ct. 1788, 179 L. Ed. 2d 651 (2011).

The development of the cause and prejudice test, as described in Part I, *supra*, was based in part on the belief that innocent petitioners would be able to meet that test. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986). However, *Carrier* also noted that this was not certain in all cases, and it therefore carved out an additional exception for a miscarriage of justice alone, with no showing of cause required. *Id.*, at 496.

Sawyer v. *Whitley*, 505 U. S. 333 (1992), considered the application of the "miscarriage of justice" exception to the specific problem of capital sentencing. There were three possibilities as to which decisions might be evaluated for a "miscarriage of justice": guilt alone,

guilt and eligibility, or guilt, eligibility, and discretionary sentencing choice. The Court chose the middle ground. See *id.*, at 343-347. As noted above, Congress subsequently overrode this choice in the context of the successive petition rule and chose guilt alone, but *Sawyer* remains the law for procedural default.

Defining "miscarriage of justice" to embrace a discretionary sentencing choice would be inherently problematic, because that choice is *always* a matter of opinion, not fact. A recent opinion poll in Connecticut asked, "Which statement comes closest to your point of view? (A) All persons convicted of murder should get the death penalty. (B) No one convicted of murder should get the death penalty. (C) Whether or not someone convicted of murder gets the death penalty should depend on the circumstances of the case." In response, 10% said all, 16% said none, and 73% said it depends. See Quinnipiac University, Death Penalty Support At New High In Connecticut (Mar. 10, 2011), Question 43, available at http://www.quinnipiac.edu/x1296.xml?ReleaseID=1566.[8] There will always be some disagreement as to whether a sentence was just regardless of the circumstances. In most cases, there will be substantial disagreement. While virtually everyone can agree that conviction of the innocent and acquittal of the guilty are miscarriages of justice, no

---

8. Although this poll is only for one State, two other more traditionally (and poorly) worded questions indicate that Connecticut voters are representative of the national average on the death penalty. Compare *id.*, Questions 41 and 42, with Newport, In U. S., 64% Support Death Penalty in Cases of Murder (Gallup, Nov. 8, 2010); see also Scheidegger, Death Penalty Support At New High In Connecticut, Crime and Consequences Blog, Mar. 11, 2011, available at http://www.crimeandconsequences.com/crimblog/2011/03/death-penalty-support-at-new-h.html (discussing question wording).

such agreement is possible for the choice of sentence for murder.

In summary, an underlying trend in the evolution of habeas law from the mid-1970s to the present has been to increase the importance of actual innocence and reduce the importance of other issues. To the extent that the evolution can continue via case law without new statutory enactments, *amicus* CJLF submits that this Court should continue on that path. Repeated, prolonged, and expensive litigation over the discretionary sentencing choice—a choice that can never be universally agreed to be a miscarriage of justice no matter which way it goes—is one of those other issues that should be deemphasized.

B. Justice in the Present Case.

Despite the melodramatic tone of his brief, Maples does not claim the miscarriage of justice exception to the procedural default rule. The reason, obviously, is that he does not remotely qualify for it. He received a just and legal sentence for a callous crime that he surely committed.

There is no dispute that Stacy Terry and Barry Robinson were murdered. They were each shot twice in the head with a .22 in a manner that caused instant death despite the small caliber of the weapon. J. A. 16; cf. *Premo* v. *Moore*, 562 U. S. ___, 131 S. Ct. 733, 742, 178 L. Ed. 2d 649, 662 (2011) (location of wound as indicative of *mens rea*). There is no dispute that Cory Maples is the one who shot them. There is no dispute that he was found a month later in a motel in Tennessee in possession of Mr. Terry's new Camaro. J. A. 15-16. The powerful inference is that he callously gunned down two men who thought he was a friend just to take their car and money, see J. A. 291 (Maples's statement), and he has offered no credible alternative explanation.

Maples's guilt phase claim against his lawyers is that they did not attempt the notorious "too drunk to form intent" defense. See Brief for Petitioner 7. This defense rarely succeeds for the very valid reason that it is rarely or never true. "Alcohol may loosen behavioral controls through a variety of biologically-induced psychological mechanisms, but intoxicated persons still know what they are doing and intend to do what they do. They might not have committed the same acts if they had been sober, but they still intended to do what they did when intoxicated." Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 45 (1984).

The traditional view is that intoxication is aggravating, not mitigating. See 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769). A State may, if it wishes, define *mens rea* so as to completely eliminate this defense, and a "significant minority of the States" have done so. See *Montana* v. *Egelhoff*, 518 U. S. 37, 58-59 (1996) (Ginsburg, J., concurring in the judgment). Alabama has not gone that far, but it has raised the bar on this defense so high as to virtually eliminate it. "[T]he intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity." *Ex parte McWhorter*, 781 So. 2d 330, 341 (Ala. 2000). According to Maples's own submission to the postconviction court, the evidence of his intoxication was that he was "loud in general," "a little hyper," and not shooting pool as well as he usually did. See J. A. 36. That is, he was the kind of obnoxious drunk that bartenders must deal with on a regular basis. This level

of intoxication does not come remotely close to negating guilt.[9] See J. A. 157 (postconviction court decision).

Eligibility for the death penalty is also quite clear. Maples killed two people rather than one, the most objective of all eligibility circumstances. See *Tuilaepa* v. *California*, 512 U. S. 967, 969-970 (1994) (requirements for eligibility circumstances). He is not retarded or a juvenile, and he is not a minor accomplice swept up in the felony-murder rule. Cf. *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002); *Roper* v. *Simmons*, 543 U. S. 551, 575 (2005); *Enmund* v. *Florida*, 458 U. S. 782, 799-801 (1982).

For the penalty phase, Maples claims that trial counsel failed to present evidence that has no direct connection to the crime and that many people would consider weak, irrelevant, or even aggravating. See Brief for Petitioner 9. "Background" evidence makes no difference to the majority of jurors and only a slight difference to most of the rest. See Garvey, Aggravation and Mitigation in Capital Cases, What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1571 (1998). Drug addiction is also considered irrelevant by the majority, and among those who consider it relevant more consider it aggravating than mitigating. See *ibid.*

The bottom-line justice of this case does not call for a change in the law in Maples's favor. Quite the contrary, he is clearly guilty of a brutal and callous

---

9. Even in the penalty phase, it is entirely reasonable for local lawyers in rural north Alabama to conclude that jurors in their community would take the Blackstone view of alcohol intoxication being aggravating rather than mitigating, and they might well take an even dimmer view of the illegal drugs of crack cocaine and crystal methamphetamine. See J. A. 36. The fact that the prosecution introduced the evidence of intoxication and the defense tried to play it down is unremarkable.

crime, and there is no mitigation that most people would regard as compelling.

Maples has already received review of his claims. He had an appeal for his claims on the record and a state postconviction petition for his claims outside the record. For the latter, he had representation by a premier law firm that few Americans could afford. What is at stake here is only reconsideration by additional courts of weak claims already considered and rejected. *Carrier*, *Sawyer*, and *House* properly acknowledged that the usual rules on procedural default may be bent to correct a miscarriage of justice, but there is none in this case.

CONCLUSION

The decision of the U. S. Court of Appeals for the Eleventh Circuit should be affirmed.

July, 2011

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES
Petitioner,

v.

KIM T. THOMAS,
ACTING COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

DEBORAH A. DEMOTT
DUKE UNIVERSITY SCHOOL OF LAW
DURHAM, NC 27708
(919) 613-7082

WALTER DELLINGER
(Counsel of Record)
ANTON METLITSKY
LAURA CONN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

Attorneys for Amica Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTEREST OF *AMICA CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. This Court Has Suggested That Principles Of Agency Law Provide Guidance For When An Attorney's Actions Should Be Attributed To His Client In The Habeas Corpus Context 6

II. Relevant Agency Doctrines 9

III. No Putative Agent Had Actual Authority To Bind Maples During The Relevant Period, And Agency Principles Thus Preclude Holding Maples Responsible For The Procedural Default In This Case 10

A. Maples's Pro Bono Counsel Terminated Their Agency Before The Relevant Period, And Their Acts Thus Cannot Be Attributable To Maples 11

B. Local Counsel's Conduct Cannot Be Imputed To Maples 15

C. The Failure Of Other Potential Agents At Sullivan & Cromwell To Respond To The Denial Of Maples's Post-Conviction Petition Cannot Be Attributed To Maples 19

TABLE OF CONTENTS

Page

IV. The Doctrine Of Apparent Authority Has No Application In This Context 22

A. The Doctrine Of Apparent Authority Does Not Apply In The Context Of A Lawyer And His Client, At Least In The Circumstances Here 23

B. Even If The Doctrine Of Apparent Authority Were Generally Applicable, It Would Not Bind Maples Here 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Coleman v. Thompson,
501 U.S. 722 (1991) 7, 14

Holland v. Florida,
130 S. Ct. 2549 (2010) 8

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 7

Link v. Wabash R. Co.,
370 U.S. 626 (1962) 6, 7

McLaughlin v. Lee,
2000 WL 34336152 (E.D.N.C. Oct. 19, 2000) 18

Murray v. Carrier,
477 U.S. 478 (1986) 7

OTHER AUTHORITIES

Alabama Rule of Professional Conduct 5.3(c) 21, 22

Floyd R. Mechem, *A Treatise on the Law of Agency* § 1189 (2d ed. 1914) 11

Joseph Story, *Commentaries on the Law of Agency* (N. St. John Green revisor 1874, 8th ed.) 2, 3, 13, 17

Restatement (Second) of Agency (1958) ..... passim

Restatement (Third) of Agency (2006) ..... passim

Restatement (Third) of the Law Governing Lawyers (2000) 23

BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Deborah A. DeMott as *amica curiae* in support of petitioner.[1]

INTEREST OF *AMICA CURIAE*

Deborah A. DeMott is the David F. Cavers Professor of Law at Duke University where she has been a member of the law faculty since 1975. Professor DeMott served as the sole Reporter for the American Law Institute's *Restatement (Third) of Agency*, published in 2006. She is the author, among other works, of *Fiduciary Obligation, Agency and Partnership*, published in 1991. She has held appointment as the Centennial Visiting Professor in the Law Department of the London School of Economics and has served as a Fulbright Senior Scholar at Sydney and Monash Universities in Australia, and she has been the New Zealand Legal Research Foundation Visiting Fellow at the University of Auckland, in addition to teaching and lecturing at other universities in the United States and abroad. In addition to her scholarship on agency and fiduciary obligation, she has written on corporate law, takeovers, and acquisi-

---

[1] Pursuant to Rule 37.6, counsel for *amica curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amica curiae* or her counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

tions.[2]

Amica has no stake in the outcome of this case other than her academic interest in the logically coherent development of the law. *Amica* is filing this brief because this case could implicate fundamental doctrines in the common law of agency, and *amica* believes her unique perspective may assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

In an agency relationship, "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006) (hereinafter *Restatement (Third)*). Acting "on behalf of" the principal, the agent represents the principal in interactions with third parties.

A relationship of agency is also a fiduciary relationship, *id.* § 1.01, which requires the agent to act "loyally for the principal's benefit in all matters connected with the agency relationship," *id.* § 8.01. Like its consensual nature, the fiduciary character of agency has long been recognized as essential to the relationship. Justice Story long ago noted the "plain and obvious consideration" that a "principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit." Joseph Story, *Commen-*

---

[2] Institutional affiliations are listed for identification purposes only.

taries on the Law of Agency § 210 (N. St. John Green revisor 1874, 8th ed.) (reprinted 2006) (*hereinafter* Story, *Commentaries*). The principal retains the agent with "a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may." *Id.*

This case concerns Cory Maples—a prisoner on death row—whose attorney-agents most certainly did not "act with a sole regard to the interests of [their] principal." In particular, Clara Ingen-Housz and Jaasi Munanka were associates at Sullivan & Cromwell LLP, but in accordance with that firm's pro bono representation policy, they represented Maples "on an individual basis." Pet. App. 257a. John Butler, local Alabama counsel, also appeared on Maples's behalf, but acted only to allow Ingen-Housz and Munanka to proceed *pro hac vice*. Butler had no other role in the case, and, indeed, actively avoided any substantive representation of Maples. Pet. App. 255a-56a.

As recounted in detail in Maples's opening merits brief, *see* Pet. Op. Br. 9-13, Ingen-Housz and Munanka filed a post-conviction petition on Maples's behalf in Alabama state trial court. The trial court denied the petition. By that time, however, the two attorneys had left Sullivan & Cromwell, without informing the court or substitute counsel. One counsel left the United States for a government position with the European Commission in Brussels. Pet. App. 258a. The other remained in the United States to become a law clerk to a federal judge, a position that precluded his representation of private clients. Pet.

App. 258a.

When the trial court denied Maples's petition, the clerk's office sent notice to his pro bono counsel of record—Ingen-Housz and Munanka—as well as to Butler. The notices sent to Ingen-Housz and Munanka were returned to the court clerk's office, marked "Return to Sender" and "Left Firm." In response, the clerk's office did nothing. And since Butler played no substantive role in the case whatsoever, he also did nothing. Maples's statutory deadline for appealing the denial of his post-conviction petition passed. The Alabama courts subsequently denied Maples's attempts to appeal as time-barred, and Maples sought to file a habeas corpus petition in federal court.

The courts below held that Maples is foreclosed from seeking federal habeas corpus relief based on a procedural default that was indisputably no fault of his own. It was, instead, attributable to the actions of Maples's pro bono attorneys—who left Maples without any authorized attorney to represent him in his state post-conviction proceedings at a time when they nevertheless remained his attorneys of record in the case—and of Butler, who had never taken on a true representation in the first place. The central question in the case when it comes to whether attorney conduct may constitute cause to excuse the default is whether those attorneys' error can be attributed to Maples.

Under settled agency principles, the answer is clearly no. No putative agent had actual authority to bind Maples during the relevant period. Under fundamental principles of agency law, the principal-

agent relationship between Maples and his New York counsel terminated before the procedural default, either because Maples's attorneys acted disloyally by abandoning him, or because they renounced their agency. Nor can Maples be held responsible for Butler's actions (or inaction). Butler was, at most, a subagent retained by Ingen-Housz and Munanka to allow them to participate *pro hac vice*, and for no other purpose. Under agency law, his agency ended with Ingen-Housz's and Munanka's. And even if Butler can be said to have been Maples's agent, Butler terminated the agency through renunciation and disloyalty to his putative principal. Finally, neither the mistakes of any other Sullivan & Cromwell attorney, nor of personnel in the Sullivan & Cromwell mailroom, can be imputed to Maples, because none of those actors was ever authorized to act as Maples's agents before the default.

Nor can the state take solace in the doctrine of apparent authority. That doctrine in many circumstances allows a third party to bind a principal to the acts of a putative agent, even when the agent acts without actual authority. But that doctrine has no application with respect to the relationship between a lawyer and a client in fundamental matters left to the client's discretion, especially when (as here) the client has little to no control over his lawyer. And in any event, the doctrine of apparent authority would not help the state even if applicable. In short, agency principles would not permit holding Maples responsible for the procedural default in this case.

ARGUMENT

I. This Court Has Suggested That Principles Of Agency Law Provide Guidance For When An Attorney's Actions Should Be Attributed To His Client In The Habeas Corpus Context

The relationship between a client and his attorney is generally one of principal and agent. Thus, agency law provides a natural framework for determining whether and how an attorney's conduct should be attributed to the client. As the principal's representative, an attorney-agent acts "on behalf of" the principal in the agent's interactions with third parties. *Restatement (Third)* § 1.01. Based on this framework, this Court has consistently mined agency law principles in determining whether an attorney's actions or inactions should be imputed to the affected clients.

For example, this Court has held that an attorney's behavior could not excuse a party from a dismissal for failure to prosecute a civil suit, explaining that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) (quotation omitted). Similarly, this Court has held that a Title VII statute of limitations—which is triggered by an EEOC

complainant's receipt of a notice from that agency—begins to run when the complainant's lawyer receives the required notification. The Court reiterated that "[u]nder our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.'" *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990) (quoting *Link*, 370 U.S. at 634 (quotation omitted)).

The Court has similarly invoked agency principles in the specific context of federal habeas corpus actions, and in particular in determining whether a habeas petitioner can demonstrate "cause" for a procedural default in state court. In *Murray v. Carrier*, although the Court did not specifically rely on agency law, it did explain that unless a defendant's counsel was constitutionally ineffective, "we discern no inequity in requiring [the defendant] to bear the risk of attorney error that results in a procedural default." 477 U.S. 478, 488 (1986). And in *Coleman v. Thompson*, the Court made its reliance on agency principles in the procedural default context explicit, holding that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" 501 U.S. 722, 753 (1991) (quoting *Murray*, 477 U.S. at 488). Any other rule, the Court explained, "would be contrary to well-settled principles of agency law." *Id.* at 754 (citing *Restatement (Second) of Agency* § 242 (1958) (hereinafter *Restatement (Second)*)).

If agency principles justify binding parties to the mistakes of their lawyers, then it follows that parties—including habeas petitioners—are *not* bound by lawyers' errors when the lawyer is *not* acting as the party's agent. As Justice Alito recently explained, "[c]ommon sense dictates that a litigant cannot be constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 2573 n.9 (Scalia, J., dissenting) (stating that an attorney's "disloyalty or renunciation of his role" would "terminate [his] authority" (citing *Restatement (Second)* §§ 112, 118)).

Of course, to say that agency principles provide guidance in this context is not to say that agency law *must* be applied here as strictly or comprehensively as it would be elsewhere. The consequences of applying strict rules governing when an unknowing principal is bound by his agent are not normally as severe as they would be in this case due to the fact that the petitioner is facing execution. And the harshness of those consequences may counsel in favor of leniency unavailable to the ordinary principal in an ordinary commercial or even litigation context. That is especially true in light of the equitable principles governing habeas corpus. *See, e.g.*, *Holland*, 130 S. Ct. at 2560-61. But the Court need not resolve that question here because, assuming agency principles are applicable, their straightforward application leads to the conclusion that Maples should not be held responsible for the procedural default in this case.

II. Relevant Agency Doctrines

As explained, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third)* § 1.01. It is a fundamental principle of agency law that whether and to what extent an agency relationship exists does not turn on the labels attached to the relationship. Rather, an "agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." *Id.* § 1.02.

There are three main doctrines under which a principal can be bound by the acts of his agents: i) an agent's exercise of actual authority; ii) apparent authority; and iii) ratification. An agent has actual authority to bind a principal "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Restatement (Third)* § 2.01. The scope of an agent's actual authority depends on the extent to which the principal has delegated that authority, either explicitly or through his manifestations. *Id.* § 2.02.

The doctrine of apparent authority, in contrast, operates parallel to actual authority and asks when a principal can be bound by a putative agent's acts, even in the absence of actual authority. Apparent

authority is the "power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third)* § 2.03. When a principal is bound vis-à-vis a third party on the basis of the putative agent's apparent authority, the principal nevertheless can recover from the agent if there was in fact no actual authority. *Restatement (Third)* §§ 2.03 cmt. a, 8.09 cmt. b.

Finally, a person may be bound by a prior act of another through ratification, i.e., assent to the prior act. *See Restatement (Third)* § 4.01.

There is no plausible argument that Maples ever ratified his purported attorneys' failure to timely appeal the denial of his post-conviction petition. Part III explains why no putative agent had actual authority to bind Maples during the relevant period. And Part IV explains why the doctrine of apparent authority has no application in this context, and why it would in any event not help the state.

III. No Putative Agent Had Actual Authority To Bind Maples During The Relevant Period, And Agency Principles Thus Preclude Holding Maples Responsible For The Procedural Default In This Case

No putative agent had actual authority to bind Maples during the relevant period, i.e., between the trial court's denial of his post-conviction petition and the day the time limit to appeal that determination lapsed. Accordingly, the procedural default in this case cannot be attributed to Maples under agency

principles.

A. Maples's Pro Bono Counsel Terminated Their Agency Before The Relevant Period, And Their Acts Thus Cannot Be Attributable To Maples

The most significant potential principal-agent relationship at issue in this case is the one between Maples and his post-conviction pro bono counsel of record, Clara Ingen-Housz and Jaasi Munanka. For the reasons explained below, Ingen-Housz's and Munanka's conduct is not attributable to Maples under ordinary principles of agency law.

1. Under fundamental agency principles, an agent must "act loyally for the principal's benefit in all matters connected with the agency relationship," *id.* § 8.01, a duty that "disallows the pursuit of self-interest as a motivating force in actions the agent determines to take on the principal's behalf," *id.* cmt. b. An agent breaches this duty by assuming a stance "antagonistic" to the principal, *see* Floyd R. Mechem, *A Treatise on the Law of Agency* § 1189 (2d ed. 1914), because the principal "has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires, *and that he will remain in that situation.*" *Id.* § 1206 (emphasis added).

An ongoing agency relationship may of course be terminated by mutual consent, *Restatement (Second)* § 117, or unilaterally by the principal, *id.* § 118. The relationship can also be terminated by the conduct of

the agent. Thus, for example, the agency relationship terminates if the agent, "without knowledge of the principal ... is ... guilty of a serious breach of loyalty to the principal." *Id.* § 112; *see also Restatement (Third)* § 5.04 ("[N]otice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person."). Similarly, an agent's renunciation terminates the agency relationship, *Restatement (Second)* § 118, and the "agent may manifest renunciation by conduct inconsistent with the continued performance of his duties to the principal," *id.* § 119 cmt. b.

2. Ingen-Housz and Munanka terminated the agency relationship by abandonment, if not also by renunciation.

Maples's counsels of record ended their representation to accept other employment on terms that effectively if not legally forbade the representation—including the continuing representation—of a private client like Maples. While Maples's post-conviction petition was pending before the Alabama trial court, Ingen-Housz left the country and joined the European Commission in Belgium, and Munanka left the firm to become a law clerk to a federal judge in New York. Pet. App. 258a. Ingen-Housz and Munanka knew that their acceptance of such employment would disable them, both legally and logistically, from continuing to represent petitioner. Moreover, Ingen-Housz and Munanka left the representation without notifying the court or substituting counsel, as required by Alabama law—

leaving Maples without authorized pro bono counsel in the proceeding at a time when he believed he was in fact represented.

a. Ingen-Housz's and Munanka's conduct plainly terminated the agency relationship, even though they remained Maples's pro bono attorneys of record in the case. Abandoning a client contravenes the "plain and obvious" undertaking of loyal service to the principal's interests that underpins any agency relationship. *See* Story, *Commentaries* § 210. The agency relationship terminates in the face of such disloyalty even without a communication of renunciation from the agent to the principal. *See Restatement (Second)* § 112 (agency relationship terminates if the agent, "without knowledge of the principal ... is ... guilty of a serious breach of loyalty to the principal").

The abandonment (and thus disloyalty) by Maples's pro bono attorneys of record is obvious here. Ingen-Housz and Munanka left their representation of Maples without substituting counsel or notifying the court—leaving Maples unrepresented in his state post-conviction proceeding at a time when Ingen-Housz and Munanka were "still attorneys of record" in Maples's case. Pet. App. 223a.[3] Because of

---

[3] Whether Maples believed his "lawyers at Sullivan and Cromwell" (J.A. 253) were Ingen-Housz and Munanka, or "other attorneys at the firm," as the state has suggested, Br. in Opp. 34, the fact is that—as the Alabama court itself found, Pet. App. 223a—Maples was left unrepresented in the action at the time of the default. Under either account, therefore, Maples was abandoned, believing that he was represented in the Alabama post-conviction proceeding when in fact he was not.

Ingen-Housz's and Munanka's actions, the Alabama court clerk's office sent notifications to the departed attorneys at their former law firm, and those notices were returned to the sending court stamped "Return to Sender," with one envelope carrying the handwritten addition: "Left Firm." As a result, neither counsel of record—nor anyone remaining at the law firm—learned of the petition's denial.

b. Termination through renunciation may be found based on an agent's conduct under even less egregious circumstances. The Restatement (Second) illustrates:

> A is P's local agent in town X. A moves away without communication to P, intending to abandon the old job and obtain a new one. Failing to get it, he returns promptly to X and transacts business for P. In the meantime P learns of A's conduct. It may be found that A's authority is terminated.

Restatement (Second) § 119 illus. 5. Termination of authority follows *a fortiori* on the facts here. Unlike in the illustration, neither Ingen-Housz nor Munanka returned purporting to resume their representation of Maples. And, as explained, both attorneys took new jobs that made it impossible to continue the representation. The agency relationship was terminated under a straightforward application of agency principles.

The actions by Maples's attorneys do not meet any plausible standard for attributing responsibility. Their conduct was not the ordinary or mundane negligence of an otherwise faithful lawyer-agent. *See,*

e.g., *Coleman*, 501 U.S. at 753. Rather, either their abandonment (disloyalty) or their renunciation served to end the agency relationship altogether. Translated into the immediate habeas context, Maples's state-level procedural default should be excused, because it was the fault of attorneys who were no longer serving as Maples's agents, and their conduct thus cannot be attributed to him.

B. Local Counsel's Conduct Cannot Be Imputed To Maples

As explained, apart from Ingen-Housz and Munanka, John Butler, local Alabama counsel, also appeared on Maples's behalf in the Alabama trial court. Butler received notice from the state court of the denial of Maples's post-conviction petition but did nothing in response. Butler's conduct cannot be attributable to Maples under agency principles.

Although Butler filed an appearance stating that he was Maples's counsel, that did not give him actual authority to bind Maples as his agent. As explained above, the question whether a putative agent has actual authority to bind a principal does not depend on labels. Rather, the existence and scope of actual authority are determined by whether the elements of an agency relationship have as a matter of fact been established. *See Restatement (Third)* § 1.02. Butler's failure to act on the notice of the denial of Maples's post-conviction petition does not bind Maples under agency law, for several reasons.

First, even if Butler did have some agency authority, his duty would best be described under agency law not as that of Maples's agent, but as In-

gen-Housz's and Munanka's subagent. "A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal." *Restatement (Third)* § 3.15. That aptly describes Butler's limited role here. Butler fulfilled a narrowly defined function as an intermediary or middleman of sorts, which was to obtain the *pro hac vice* admission of counsels of record in Alabama courts. *See* Pet. App. 255a. Butler performed no other role and there is no indication that Butler ever communicated with Maples, or that Maples understood him to play any role in his defense. Although the Alabama rules required the inclusion of local counsel's name on "all notices, orders, pleadings, and other documents filed in the cause," J.A. 365-66, counsels of record had agreed that local counsel would bear no substantive responsibility toward petitioner. Pet. App. at 256a. Given the onus placed on Ingen-Housz and Munanka to find and retain local counsel, at most Butler occupied the role of Ingen-Housz's and Munanka's subagent, to whom they delegated responsibility for enabling their representation of Maples *pro hac vice*.

Because Butler is best classified as a subagent, his actual authority to bind Maples terminated with that of Ingen-Housz and Munanka. "Whether a subagent acts with actual authority depends on three separate consensual relationships: (1) between principal and appointing agent; (2) between appointing agent and subagent; and (3) between principal and subagent. A subagent's actual authority terminates upon notice to the subagent that any of these relationships is severed." *Restatement (Third)* § 3.15

cmt. e. And under agency doctrine, a person has "notice" of a fact when the person "knows the fact, has reason to know it, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." *Id.* § 5.01(3).

Here, as explained, Ingen-Housz and Munanka severed their agency relationship with Maples, either through abandonment (disloyalty) or renunciation. *See supra* Part III.A. And Butler had "notice" of that severance; as Maples's local counsel and Ingen-Housz's and Munanka's subagent, he plainly "should [have] know[n]," in order "to fulfill [his] duty to" Maples, that the attorneys who Butler had insisted would handle all matters in Maples's case had in fact ended their representation. *Id.* § 5.01(3); *see also* Story, *Commentaries* § 469 (explaining that the subagency is automatically terminated upon severance of the primary agency relationship because the subagency is a "dependent power," and because termination is "a natural result from the presumed intention of the principal"). Thus, when Ingen-Housz and Munanka terminated their agency relationship with Maples, so too did they sever Butler's authority to act as a subagent.

Second, even if Butler could have been considered Maples's agent at one time, his failure to respond to the notice of the denial of Maples' post-conviction petition cannot be attributable to Maples, because Butler severed the agency through his intentional conduct. As explained, an agent must "act loyally for the principal's benefit in all matters connected with the agency relationship," *Restatement (Third)* § 8.01, a duty that "disallows the pursuit of self-interest as

a motivating force in actions the agent determines to take on the principal's behalf," *id.* cmt. b. But Butler plainly did not act in accordance with his duty of loyalty in *any* matter other than assuring that Ingen-Housz and Munanka could appear *pro hac vice*. Indeed, Butler informed Ingen-Housz and Munanka "at the outset of the case" that he would have no role beyond allowing the New York attorneys to appear *pro hac vice*, because he "did not have the resources, available time or experience" to take on any broader role. Pet. App. 255a. And although Butler communicated those restrictions to Ingen-Housz and Munanka, nothing in the record suggests that they were communicated to Maples.

By so restricting the range of his activity, local counsel abandoned petitioner and severed any agency relationship between them. To be sure, unlike Ingen-Housz and Munanka, local counsel did not leave the physical site of his law practice, but the impact of his considered inaction was the same for petitioner—Butler ceased to function (indeed, never began to function) as Maples's agent. Even though Butler agreed to the use of his name in filings, his renunciation and conduct provided Maples with "counsel in name only." *McLaughlin v. Lee*, 2000 WL 34336152, at *3 (E.D.N.C. Oct. 19, 2000). And if Butler's conduct were not enough by itself to sever the agency relationship, the given reason for that conduct certainly would be. Butler's stated motivation for his inaction was explicitly self-regarding, *viz.*, his preference to allocate his "resources," including his time, to his own ends or those of other clients, rather than to Maples. Butler's representation restrictions and his inaction thus constituted a serious

breach of his duty of loyalty to Maples, which plainly severed any agency relationship that may have existed. Maples cannot be held responsible for the actions (or inaction) of local "counsel," who was—if an agent at all—an agent in name only.

C. The Failure Of Other Potential Agents At Sullivan & Cromwell To Respond To The Denial Of Maples's Post-Conviction Petition Cannot Be Attributed To Maples

The state may argue that Maples can be held responsible for the mistakes of other attorneys at Sullivan & Cromwell, or by personnel in that firm's mail room. Not so.

1. No other attorneys at Sullivan & Cromwell received notice of the denial of Maples' post-conviction petition. To the extent that their failure to become notified was negligent, that negligence cannot be imputed to Maples for the simple reason that no Sullivan & Cromwell attorney other than Ingen-Housz and Munanka was ever Maples's agent in the state post-conviction proceeding or could have had actual authority to act for Maples.

The record evidence is clear that "[l]awyers at S&C handle *pro bono* cases on an individual basis." Pet. App. 257a. Thus, according to the record, when Maples engaged Ingen-Housz and Munanka as his agents, he engaged *only* them, and not their law firm or any other individuals in the firm. And while other lawyers at the firm reportedly may have made plans to take over Maples's representation when Ingen-Housz and Munanka departed, they never became Maples's authorized agents in the post-

conviction proceeding before the default.

First, because any other Sullivan & Cromwell attorneys would have represented Maples in their individual capacity, there would be no agency relationship unless Maples manifested his assent to have such individuals act as his agents in his post-conviction proceeding. *See, e.g.*, *Restatement (Third)* § 1.01 (requiring that the principal "manifests assent" that "the agent shall act on the principal's behalf and subject to the principal's control"). The record does not answer whether such assent was given.

Second, even if Maples agreed to have other attorneys at Sullivan & Cromwell represent him, he still would not be bound by their actions (or inactions). Under agency law, the "failure to acquire a qualification by the agent without which it is illegal to do an authorized act ... terminates the agent's authority to act." *Restatement (Second)* § 111. And, as the Alabama court itself found, no other Sullivan & Cromwell attorney became admitted to practice in Alabama during the relevant period. Thus, no other Sullivan & Cromwell attorney could have had actual authority to bind Maples.[4]

Third, and finally, even if other attorneys at Sullivan & Cromwell were at any point Maples's agent, they abandoned him. No one at the firm made any

---

[4] It goes without saying that the later efforts of Sullivan & Cromwell attorneys to represent Maples and to cure the procedural default do not remedy the fact that no attorney, including any Sullivan & Cromwell attorney, acted as Maples' agent during the relevant time period—between the time the trial court denied Maples's post-conviction petition and the running of the statute of limitations to appeal that denial.

effort to file an appearance in the Alabama trial court or to otherwise investigate the state of play there, even though they presumably knew that Ingen-Housz and Munanka were gone and would no longer have any role in Maples's case. That is not simply negligent conduct, as missing a filing deadline would be. It is disloyal conduct, because it deprives Maples of any representation at all—when Maples believed he was represented by counsel in that proceeding. Accordingly, even if any Sullivan & Cromwell attorney other than Ingen-Housz or Munanka was ever Maples's agent, they severed that relationship by failing to give Maples their undivided loyalty.

2. Maples is similarly not chargeable with the actions or errors of personnel in Sullivan & Cromwell's mail room, which returned the notices of the denial of Maples's post-conviction petition to the state. As explained, Ingen-Housz and Munanka, and not the firm itself, were petitioner's agents. Once counsel abandoned their agency relationship with petitioner, any conceivable basis for holding Maples responsible for mishaps in the mailroom terminated as well.

In any event, under Alabama's Rule of Professional Conduct 5.3(c), a lawyer is generally not responsible for conduct of a nonlawyer that, if done by a lawyer, would breach the lawyer's duties. The only potentially relevant exception to that rule is if the lawyer specifically ordered or ratified the conduct or is a partner in a law firm with direct supervisory re-

sponsibility over the nonlawyer.[5] But there is no evidence that any lawyer specifically ordered or ratified any conduct of the mailroom here, or had direct supervisory responsibility over the mailroom at all. As such, even if Ingen-Housz and Munanka had been employed by the firm at the time of the mailroom's actions, they would not have been chargeable with the mailroom's conduct under this Rule. As Ingen-Housz and Munanka never had responsibility for the conduct of those in the mail room, the actions of the mail room are no different than if FedEx or UPS had failed to deliver the notices in the first place. In no event can the mailroom's conduct be attributed to Maples.

IV. The Doctrine Of Apparent Authority Has No Application In This Context

The only other plausible basis on which to hold Maples responsible for his putative agents' conduct is the doctrine of apparent authority, under which a third party may bind a principal to the acts of a putative agent, even when the agent has no actual authority, "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's mani-

---

[5] Rule 5.3(c) says that "[a] lawyer shall be responsible for conduct of [a nonlawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

festations." *Restatement (Third)* § 2.03. Apparent authority has no application in the context of the relationship between a criminal defendant and his lawyer, particularly in the circumstances of this case. And even if it did, that doctrine would not hold Maples responsible for the conduct of any putative agent.

A. The Doctrine Of Apparent Authority Does Not Apply In The Context Of A Lawyer And His Client, At Least In The Circumstances Here

The doctrine of apparent authority has no application here, for several reasons.

To begin, the doctrine of apparent authority is generally inconsistent with ordinary understandings of the attorney-client relationship, in which certain fundamental decisions require that the agent act with actual authority. *Restatement (Third) of the Law Governing Lawyers* § 27 cmt. d (2000) (retaining an attorney does not create apparent authority in such matters as the decision to take a criminal appeal). While the client is of course bound by the conduct—even the negligent or wrongheaded conduct—of his attorney acting *within* the scope of his agency, it would be utterly bizarre to hold a client responsible for an attorney's conduct *when the attorney is not acting as his agent at all*. Were it otherwise, a lawyer purporting to represent a client but having no actual authority could, for example, forfeit an appeal or negotiate a guilty plea. That is not the law. *Cf. Restatement (Third)* § 3.03 cmt. b (explaining that clients may not be bound under the doctrine of apparent authority by an attorney's attempt to settle a

case).

The doctrine of apparent authority is a particularly poor fit in the context of this case, where the putative principal is a death row inmate with little if any control over his putative agent. As the statement of the general rule of apparent authority makes clear, the underlying rationale for that doctrine stems from manifestations made *by a principal* concerning an agent's authority. *Restatement (Third)* § 2.03 & cmt. c. When the principal is in control of manifestations of authority, he is responsible for actions that third parties reasonably take in response to the conduct of the putative agent. In those circumstances, the principal is in a better position to disabuse the third party of the existence of actual authority than the third party is to figure out the parameters of the agency relationship for himself. But when the principal makes no manifestation of authority, the doctrine of apparent authority loses its bearings.

Maples had little or no control over his manifestation of authority concerning Ingen-Housz, Munanka, Butler, or anyone else. The first two abandoned him, and the third was never his agent in the first place. Meanwhile, Maples was locked up in a prison cell in Alabama and reasonably believed he was represented by lawyers who would—and could—consult with him and appeal the denial of his state post-conviction petition when the court acted. Accordingly, Maples had no opportunity to renounce his agents or cabin their authority.

Apparent authority is inapplicable in this context for another reason. Normally, when a principal is

bound vis-à-vis a third party on the basis of the putative agent's apparent authority, the principal nevertheless can recover from the agent if there was in fact no actual authority. *Restatement (Third)* §§ 2.03 cmt. a, 8.09 cmt. b. But here, Maples cannot possibly be made whole by bringing an action against any of his putative agents. While they may be subject to money damages, money cannot give back Maples's opportunity to appeal the denial of his post-conviction petition in state court, or to challenge his conviction and sentence in federal habeas. Indeed, the radically asymmetrical consequences that would result in applying the doctrine of apparent authority here—Maples will be executed without any opportunity to challenge his conviction in federal habeas, and without any adequate recourse against his fleeing agents, while the state would have to defend a conviction in federal court, as it would have had to do anyway—make clear that this doctrine is inapplicable in these circumstances.

B. Even If The Doctrine Of Apparent Authority Were Generally Applicable, It Would Not Bind Maples Here

Even if the doctrine of apparent authority were applicable in this context, that doctrine would not hold Maples responsible for the conduct of Ingen-Housz, Munanka, or Butler. As explained, a third party may bind a principal only when the "third party *reasonably* believes the actor has authority to act on behalf of the principal." *Restatement (Third)* § 2.03 (emphasis added). Thus, an agent ceases to act with apparent authority "when it is no longer reasonable for the third party with whom an agent

deals to believe that the agent continues to act with actual authority." *Id.* § 3.11(2). "If a third party has notice of facts that call the agent's authority into question, and these facts would prompt a reasonable person to make inquiry of the principal before dealing with the agent, the agent does not act with apparent authority.") *Id.* cmt. e. As explained, a person has "notice" of a fact when the person "knows the fact, has reason to know it, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." *Id.* § 5.01(3).

The Alabama court clerk's office could not have had a reasonable belief that Ingen-Housz and Munanka continued to act as Maples's agents. When the "Return to Sender" and "Left Firm" notifications arrived back at the state courthouse, the court clerk—and the state—were placed on notice of facts that called into serious question whether petitioner continued to be represented by his counsels of record. Yet despite receiving the notifications stamped "Return to Sender," the state failed to make reasonable inquiry into whether Ingen-Housz and Munanka continued to serve as Maples's agents.

The state is also precluded from relying on apparent authority as to Butler. The returned notices from the counsels of record sufficed to place the clerk on notice that something was seriously awry with respect to Maples's legal representation. The clerk thus had "notice of facts that call" all of Maples's purported lawyers' "authority into question." *Id.* cmt. e. Brief inquiries would have clarified the matter—and in time for an appeal within the relevant 42-day period—but the clerk did nothing. In all

events, but particularly in a context with such grave consequences for the principal, the state's failure to inquire into the circumstances of Maples's representation precludes any reliance on the doctrine of apparent authority.

CONCLUSION

For the foregoing reasons, if principles of agency are applied, the judgment below should be reversed.

Respectfully submitted,

DEBORAH A. DEMOTT
DUKE UNIVERSITY SCHOOL OF LAW
DURHAM, NC 27708
(919) 613-7082

WALTER DELLINGER
(Counsel of Record)
ANTON METLITSKY
LAURA CONN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

Attorneys for Amica Curiae

May 25, 2011

AMICUS CURIAE BRIEF

RECORD
AND

No. 10-63

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS,
Interim Commissioner, ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF LEGAL ETHICS PROFESSORS AND PRACTITIONERS AND THE ETHICS BUREAU AT YALE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE J. FOX
Counsel of Record
DRINKER BIDDLE &
REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Lawrence.Fox@dbr.com
Counsel for Amici Curiae

SUSAN D. REECE MARTYN
Stoepler Professor of
Law and Values
UNIVERSITY OF TOLEDO
COLLEGE OF LAW
2801 West Bancroft Street
Toledo, OH 43606
(419) 530-4212
susan.martyn@utoledo.edu
Counsel for Amici Curiae

Dated: May 25, 2011

THE LEX GROUP DC • 1825 K Street, N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax (202) 955-0022 • www.thelexgroup.com

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Sullivan & Cromwell Abandoned its Client Under the Most Extraordinary Circumstances 6

A. Lawyer Fiduciary Duties to Clients 6

B. Sullivan & Cromwell's Responsibilities 8

C. The Associates' Abandonment 13

D. Sullivan & Cromwell's Abandonment 15

II. This Case is Not About the Mail Room 18

III. Local Counsel Abandoned the Client 20

IV. Sullivan & Cromwell's Post-Default Conduct Ratified and Reinforced Its Earlier Abandonment 23

V. Sullivan & Cromwell's Post Hoc Justification Reflects Unethical Conduct 27

VI. Conclusion 30

Appendix A

Identity of Amici Curiae

TABLE OF AUTHORITIES

Page(s)

CASES

Esters v. State,
894 So.2d 755 (Ala. Crim. App. 2003)..... 13, 14

Farkas v. Sadler,
375 A.2d 960 (R.I. 1977)..... 17

Fla. Bar v. King,
664 So. 2d 925 (Fla. 1995)..... 7

In re Kiley,
459 Mass. 645 (2011)..... 16

In re Tallon,
447 N.Y.S.2d 50 (App. Div. 1982)..... 24

In re Vaughan,
801 So. 2d 1058 (La. 2001)..... 7

Maples v. Allen,
586 F.3d 879 (11th Cir. 2009)..... 9

Myers v. Miss. State Bar,
480 So. 2d 1080 (Miss. 1985), *cert. denied*,
479 U.S. 813 (1986)..... 17

Olds v. Donnelly,
696 A.2d 633 (N.J. 1997)..... 24

Patterson v. State,
288 So. 2d 446 (Ala. 1974) 14, 17

People v. Elliott,
39 P. 3d 551 (Colo. 2000) 7

Piper v. S. Ct. of New Hampshire,
470 U.S. 274 (1985) 21

Streit v. Covington & Crowe,
82 Cal. App. 4th 441 (2000) 23

Strickland v. Washington,
466 U.S. 668 (1984) 24

Wait v. Second Judicial Dist. Court,
407 P.2d 912 (Nev. 1965) 18

RULES

Ala. Bar Admission Rule VII 20

Ala. Bar Admission Rule VII(c) 21

Ala. R. App. P. 4(a)(1) 3

Ala. R. Crim. P. 6.2(b) 13

Ala. R. Prof'l Conduct R. 1.1 ..... 6, 7, 23

Ala. R. Prof'l Conduct R. 1.2 22

Ala. R. Prof'l Conduct R. 1.2(a) 22

Ala. R. Prof'l Conduct R. 1.2(c) 22

Ala. R. Profl Conduct R. 1.3 ..... 6, 7, 16

Ala. R. Profl Conduct R. 1.3 Comment 7

Ala. R. Profl Conduct R. 1.4 .....6, 7, 13, 14

Ala. R. Profl Conduct R. 1.7(b) 23

Ala. R. Profl Conduct R. 1.7 Comment 23

Ala. R. Profl Conduct R. 1.8(n) 26

Ala. R. Profl Conduct R. 1.16 .....*passim*

Ala. R. Profl Conduct R. 1.16 Comment 16

Ala. R. Profl Conduct R. 1.16(b) 17

Ala. R. Profl Conduct R. 1.16(c) 7, 17

Ala. R. Profl Conduct R. 1.16(d) 7, 17, 18

Ala. R. Profl Conduct R. 3.4(c) 22

Ala. R. Profl Conduct R. 5.1 ..... 12, 15, 28

Ala. R. Profl Conduct R. 5.1(a) 10, 29

Ala. R. Profl Conduct R. 5.2 8

Ala. R. Profl Conduct R. 5.3(a) 19

Ala. R. Profl Conduct R. 6.2 Comment 7, 29

Ala. R. Prof'l Conduct R. 8.5(b) 8

Sup. Ct. R. 37.2 1

OTHER AUTHORITIES

7A C.J.S. *Attorney & Client* § 270 14

Baker & McKenzie,
Clara Ingen-Housz,
http://www.bakermckenzie.com/
Clara Ingen-Housz
(last visited May 7, 2011) 2

Hogan Lovells,
Jaasi J. Munanka,
http://www.hoganlovells.com/jaasi-munanka/
(last visited May 7, 2011) 2

N.Y. Code Prof'l Resp. DR 1-104
22 N.Y.C.R.R. § 1200.5 (2002) 13, 28

N.Y. Code Prof'l Resp. DR 1-104(c)
22 N.Y.C.R.R. § 1200.5 (2002) 19

Restatement (Third) of the
Law Governing Lawyers § 11 28

Restatement (Third) of the
Law Governing Lawyers § 14 7

Restatement (Third) of the
Law Governing Lawyers § 14 cmt. b 7

Restatement (Third) of the
Law Governing Lawyers § 14 cmt. h 10, 15

Restatement (Third) of the
Law Governing Lawyers § 16(2) 6

Restatement (Third) of the
Law Governing Lawyers § 19 17

Restatement (Third) of the
Law Governing Lawyers § 19, cmt. c..... 22

Restatement (Third) of the
Law Governing Lawyers § 20 ..... 6, 14

Restatement (Third) of the
Law Governing Lawyers § 20 cmt. c..... 24

Restatement (Third) of the
Law Governing Lawyers § 31 7

Restatement (Third) of the
Law Governing Lawyers § 31 cmt. f..... 10

Restatement (Third) of the
Law Governing Lawyers § 32 7

Restatement (Third) of the
Law Governing Lawyers § 32(3) 17, 19

Restatement (Third) of the
Law Governing Lawyers § 32(4) 17

Restatement (Third) of the
Law Governing Lawyers § 32(5) 17

Restatement (Third) of the
Law Governing Lawyers § 33(1) 14

Restatement (Third) of the
Law Governing Lawyers § 58 15

Sullivan & Cromwell LLP (2005)
http://www.sullcrom.com 11

Vault Guide to Law Firm Pro Bono Programs
674 (3d ed. 2007) 10, 11, 28

INTEREST OF AMICI CURIAE[1]

Amici Curiae have an interest in assisting this Court in recognizing the professional ethical obligations of counsel for a convicted individual on death row in a habeas corpus proceeding to obey client instructions, communicate material information to the client, withdraw from a representation only upon notice to the client and approval by the court, as well as the extraordinary circumstances that arise if counsel fails to fulfill those duties to the client, flouts counsel's obligations to the court and abandons the client, severing the lawyer-client relationship.

The brief of *Amici Curiae* will not address every point argued by the parties. Instead, *Amici Curiae* focus on the professional responsibility issues described above.

Because of the large number of *amici curiae* the names and brief descriptions of these individuals and the Ethics Bureau at Yale are attached as an appendix.

---

[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amici Curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF THE CASE

Petitioner Cory Maples, convicted of capital murder, initiated state post-conviction proceedings in which Mr. Maples sought review of his 1997 conviction and death sentence. He argued that his trial counsel had been grossly ineffective. Pet'r's Cert. Pet. 3. In 2001, two Sullivan and Cromwell lawyers, Ms. Clara Ingen-Housz and Mr. Jaasi Munanka, appeared in Alabama state court as counsel *pro hac vice* for Mr. Maples, having had their admission supported by required local counsel, Mr. John Butler, whose only participation in the matter was facilitating the *pro hac* admission of Ms. Ingen-Housz and Mr. Munanka. App. to Pet'r's Cert Pet. 257a. Both lawyers were junior associates at the firm; both had practiced law for less than two years.[2] Ms. Ingen-Housz and Mr. Munanka may have worked with other Sullivan & Cromwell lawyers on the case. *See id.* at 257a. They provided the Alabama court with the address of the Sullivan & Cromwell office at 125 Broad Street in New York City. They filed a state habeas petition on August 1, 2001 (cert pet 5). In the summer of 2002, while this petition was pending before the Alabama trial court, both Ms. Ingen-Housz and Mr. Munanka left Sullivan & Cromwell, without notifying the court of their departure. *Id.* at 258a. Although other lawyers at Sullivan & Cromwell were "involved" in

---

[2] Ms. Ingen-Housz was admitted to the New York bar in 2000. *See* Baker & McKenzie, Clara Ingen-Housz, http://www.bakermckenzie.com/claraingen-housz (last visited May 7, 2011). Mr. Munanka graduated from the University of Michigan Law School in 1999. *See* Hogan Lovells, Jaasi J. Munanka, http://www.hoganlovells.com/jaasi-munanka/ (last visited May 7, 2011).

the case, *Id.* at 257a, the firm did not inform the trial court that Ms. Ingen-Housz and Mr. Munanka had left, nor did any new Sullivan & Cromwell lawyer ever enter an appearance before the trial court until after the unfortunate events that give rise to this appeal. *Id.* at 258a.

The Alabama trial court denied Mr. Maples's petition on May 22, 2003. It sent copies of its order denying relief to Ms. Ingen-Housz and Mr. Munanka at their Sullivan & Cromwell addresses. Pet'r's Cert. Pet. 6. It also sent a copy of the order to Mr. John Butler, Mr. Maples's local counsel in Alabama. The envelopes addressed to the Sullivan & Cromwell associates (who had left the firm about 10 months earlier) were returned unopened to the Alabama trial court clerk. *Id.* Mr. Butler, who had explicitly refused to accept any further role in the case, received the order but took no action regarding it. App. to Pet'r's Cert. Pet. 255a.

The Alabama Rules of Appellate Procedure allow state habeas petitioners 42 days to appeal orders denying relief. *See* Ala. R. App. P. 4(a)(1). Sullivan & Cromwell did not file an appeal before this period expired. Mr. Maples learned that his petition had been denied and that the period to appeal had expired from a state prosecutor, who wrote him a letter informing him of these "recent events" in August 2003. Pet'r's Cert. Pet. 7. Mr. Maples promptly alerted his stepmother, who immediately called Sullivan & Cromwell. With sudden interest in the case, lawyers from the firm then unsuccessfully sought leave to file an appeal in the state proceeding. *Id.* at 7. On August 29, 2003, Mr. Maples filed a federal habeas petition. The

district court denied the petition on the grounds of the state court default, and Mr. Maples appealed. *Id.* at 8. A divided panel of the Court of Appeals for the Eleventh Circuit affirmed, extinguishing Mr. Maples's last opportunity to challenge his conviction and death sentence. *Id.*

SUMMARY OF ARGUMENT

Amici Curiae file this brief to address key issues that, by virtue of *Amici Curiae*'s special background, expertise and teaching in the area of lawyer ethics and professional responsibility, might assist the Court in evaluating the behavior of all lawyers in this matter.

Any one abandonment – by Sullivan & Cromwell's two associates, by local counsel, or by Sullivan & Cromwell's other lawyers—would have warranted relief for Mr. Maples. Here, depending on how one counts, there were at least three abandonments that independently created this devastating train wreck that has left Mr. Maples in extremis.

First, *Amici Curiae* will explain how, accepting responsibility for Mr. Maples's case without limitation, qualification or reservation, two of the firm's associates proceeded to abandon the client when the young lawyers left, without notice to the court. Then, Sullivan & Cromwell's other lawyers, knowing of this departure and having been involved in the case for over a year, perpetuated the abandonment of Mr. Maples by ignoring the firm's fundamental obligations to court and client.

Second, *Amici Curiae* will show how local counsel abandoned Mr. Maples, usurping the role of the client by defining the objectives of the representation to assign himself no responsibility whatsoever, thereby unethically limiting the scope of the representation without notifying, let alone securing, the consent of either the court or his client.

Third, *Amici Curiae* will address the *post hoc* justification for its behavior that Sullivan & Cromwell unfortunately adopted. The firm made the incredible claim, based on its "individual capacity representation" construct, that the firm was never responsible for the case and that the firm had no obligations to Mr. Maples upon learning that his two inexperienced lawyers were departing from the firm. And despite the admitted involvement of its several other lawyers, Sullivan & Cromwell denied any duty to find replacement counsel for the client. Indeed, Sullivan & Cromwell's effort – after reentering the case after Mr. Maples's appeal deadline passed – seems primarily aimed not at protecting Mr. Maples, but rather at absolving itself from the blame for abandoning its client.

Mr. Maples should not be denied his entitlement to proceed because of the professional misconduct of his lawyers; for this to occur, particularly in a capital case, would be the gravest injustice.

ARGUMENT

I. Sullivan & Cromwell Abandoned its Client Under the Most Extraordinary Circumstances

This case presents an inexplicable case of lawyers initiating an important – no critical – representation of a client on death row, then abandoning the client without notification. In the process, these lawyers engaged in a frontal assault on almost all of the most important fiduciary duties they were required to fulfill. These duties are celebrated in the common law, enshrined in our rules of professional conduct, and are codified in the Restatement of the Law Governing Lawyers, three definitive sources of authority from which any professional responsibility analysis should proceed.

A. Lawyer Fiduciary Duties to Clients

As the Court approaches this case it should have in mind the exact nature of the duties *Amici Curiae* recognize as having been violated here. First, when a lawyer undertakes a case, the lawyer must act with reasonable competence and diligence to carry it through to conclusion. Ala. R. Prof'l Conduct R. 1.1, 1.3, 1.16 Comment (2002); Restatement (Third) of the Law Governing Lawyers § 16(2) (2000) [hereinafter RLGL]. Second, failure to notify a client when a lawyer leaves a firm or ceases working on a matter violates a lawyer's duty to communicate directly with the client about the status of the case. Ala. R. Prof'l Conduct R. 1.4 (2002), RLGL § 20 (2000). Third, a lawyer is only relieved of these obligations when the relationship is

terminated in a manner consistent with the requirements of Rule 1.16. Ala. R. Prof'l Conduct R. 1.3 Comment (2002); RLGL § 14 cmt. b (2000). Fourth, Rule 1.16 requires the tribunal's permission to withdraw, and protection of the client's interests to terminate a representation. Ala. R. Prof'l Conduct R. 1.16(c), (d) (2002); RLGL §§ 31, 32 (2000). Finally, all of these obligations apply in the same measure to appointed as well as retained lawyers. Ala. R. Prof'l Conduct R. 6.2 Comment (2002); RLGL § 14 (2000).

Lawyers who violate these rules abandon their clients and are subject to severe professional sanctions. *See, e.g., In re Vaughan*, 801 So. 2d 1058 (La. 2001) (lawyer suspended from practice for three years for abandoning his client in violation of Rules of Professional Conduct 1.3, 1.4 and 1.16 by closing office without notifying client), *People v. Elliott*, 39 P. 3d 551 (Colo. 2000) (lawyer disbarred for abandoning two clients in violation of Rules of Professional Conduct 1.3 and 1.4 by agreeing to provide specific professional services, failing to provide the services and failing to protect his clients or to communicate with them regarding the matters he was handling), *Fla. Bar v. King*, 664 So. 2d 925 (Fla. 1995) (lawyer suspended from practice for three years for taking on a case and ceasing communication with a client without following procedures for withdrawal in violation of Rules of Professional Conduct 1.1, 1.3, 1.4 and 1.16).[3]

---

[3] Rules of Professional Conduct 1.1, 1.3, 1.4 and 1.16, violated in these cases, were all adopted by the Alabama Supreme Court and were in effect at the times in question. It is the Alabama

B. Sullivan & Cromwell's Responsibilities

Respondent asserts that even if Mr. Maples was abandoned by the two young Sullivan & Cromwell associates and by local counsel, he was not abandoned by Sullivan & Cromwell, which allegedly had other firm lawyers "involved" in the matter from 2001.[4] For sure, Mr. Maples's two pro bono attorneys of record, as lawyers, had these professional duties to the client for whom they entered an appearance and to the court before whom they appeared, duties they systematically violated;[5] but to the extent that Respondent tries to shift the focus to other lawyers, that does not diminish the responsibility of Sullivan & Cromwell itself.

---

rules that would apply here because the professional responsibility rules of the forum state apply in matters pending before a tribunal. *See* Ala. R. Prof'l Conduct R. 8.5(b) (2002).

[4] One of Sullivan & Cromwell's partners states: "I have been involved in this case since the summer of 2001," a year before Sullivan & Cromwell's associates left the firm. De Leeuw Aff. ¶ 1. His affidavit fails to define what "involvement" meant. The same partner asserts that after the associates left the firm in the summer of 2002, "other lawyers at S&C have worked on the case." De Leeuw Aff. ¶ 5. Later, however, Mr. DeLeeuw told the Eleventh Circuit that he and any other lawyers involved in the case before the default were "just waiting for any further proceedings." Ultimately, the record does not disclose what, if anything, these lawyers actually did after the associates left and before the default.

[5] The Alabama Rules of Professional Conduct, like the rules of virtually every jurisdiction, provide that a lawyer, no matter how junior, has an independent obligation to conform the lawyer's conduct to the rules. "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." Ala. R. Prof'l Conduct R. 5.2.

Perhaps Respondent takes some comfort from the allegation that Sullivan & Cromwell allegedly had other firm lawyers "involved" in the matter from 2001. Or from the Eleventh Circuit observation that "Maples's Sullivan & Cromwell attorney acknowledged at oral argument [that] arrangements had been made within the firm for other attorneys at Sullivan & Cromwell to take over representation of Maples." *Maples v. Allen*, 586 F.3d 879, 884 (11th Cir. 2009). But whatever way the Sullivan & Cromwell role is characterized, the fact is that Sullivan & Cromwell, the law firm, abandoned Mr. Maples, leaving him without counsel of record and without any lawyer at all from the time the associates left the firm until after the appeal deadline passed. Put simply, after the associates departed, Sullivan & Cromwell relinquished responsibility for Mr. Maples, springing into action only after the results of the abandonment became clear. Only then did Sullivan & Cromwell take steps, but those step transparently reflected the firm's conflict of interest.

Despite conceding some "involvement" in the matter, the firm's partners told the Alabama Court that when Sullivan & Cromwell lawyers took on pro bono matters – and this rule applied inexplicably only to pro bono matters – they did so in their individual capacity.[6] It is not clear to *Amici Curiae* why the firm took this approach or why the firm

---

[6] "Lawyers at S&C handle *pro bono* cases on an individual basis. Accordingly, the lawyers who first appeared in this case, and all lawyers who have participated thereafter, have done so on an individual basis, and have attempted not to use the firm name on correspondence or court papers." DeLeeuw Aff. ¶ 2.

attached any ethical significance to this unusual assertion. From a professional responsibility point of view it was not only irrelevant, it contradicted the requirements of the rules that required Sullivan & Cromwell to provide supervision and take responsibility over inexperienced lawyers. Ala. R. Prof'l Conduct R. 5.1(a) (2002) ("A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."); *see also* RLGL § 31 cmt. f (2000) ("When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained (see § 14, cmt. h). Hence, when a lawyer involved in a representation leaves the firm, the client can ordinarily choose whether to be represented by that lawyer, by lawyers remaining at the firm, by neither, or by both. . . . When a lawyer leaves a large firm, for example, it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not.").

It also contradicted Sullivan & Cromwell's own identification of pro bono cases in a pro bono questionnaire. Asked to "list up to three pro bono matters that are representative of the pro bono work *your firm* participates in," (emphasis supplied) Sullivan & Cromwell, the law firm, answered listing numerous pro bono matters including three capital cases, one in Alabama, presumably the *Maples* case. *Vault Guide to Law Firm Pro Bono Programs* 674 (3d ed. 2007).

Indeed, the record belies the assertion that Sullivan & Cromwell's lawyers represented Mr. Maples in an individual capacity. Simply consider the following. These two lawyers were employed full time by Sullivan & Cromwell. Their offices were at Sullivan & Cromwell. Their address was Sullivan & Cromwell's address. Their email addresses were at Sullivan & Cromwell's domain. They were on the Sullivan & Cromwell payroll, were listed on the Sullivan & Cromwell website as Sullivan & Cromwell lawyers, used Sullivan & Cromwell stationery, computer systems, desks and library, undoubtedly billed all their time, including this pro bono time, to the Sullivan & Cromwell timekeeper accounting system, hours that Sullivan & Cromwell reported to the world in pro bono surveys of top firms.[7] Moreover, Sullivan & Cromwell, as a firm, touts the Sullivan & Cromwell pro bono program and commitment.[8] As a result, despite the law firm's protestations to the contrary, any lawyer who works in Sullivan & Cromwell's offices at the now famous address – 125 Broad Street – is the responsibility, from a professional responsibility point of view, of Sullivan & Cromwell.

Given the foregoing, the conclusion is ineluctable that Sullivan & Cromwell abandoned Mr. Maples, particularly when this matter was undertaken without hesitancy, qualification or

---

[7] For example, Sullivan & Cromwell reported 30,025 pro bono hours in 2003. *Vault Guide to Law Firm Pro Bono Programs* 674 (3d ed. 2007).

[8] *See* Sullivan & Cromwell LLP (2005), http://www.sullcrom.com.

limitation,[9] a fact that stands in sharp contrast to local counsel's early abandonment of Mr. Maples, which local counsel claims occurred *ab initio*. Accordingly, Sullivan & Cromwell owed Mr. Maples all of the protections and services required by the Alabama Rules of Professional Conduct and, to the extent not inconsistent with these rules, by the New York Code of Professional Responsibility, as well as the fiduciary duties established in the common law. These were protections Mr. Maples had every right to expect to be fulfilled, requirements that were fulfilled, more or less, up to a critical juncture.[10]

---

[9] There is apparently no retainer letter between any Sullivan & Cromwell lawyers and Mr. Maples limiting the scope of the representation. Though it is doubtful that limiting the scope would have been ethically permissible if the firm had done so, the record is also devoid of any Sullivan & Cromwell notice to the client in any form that Sullivan & Cromwell had placed a scope limitation on the firm's representation of Mr. Maples.

[10] Three provisions in New York's Code of Professional Responsibility required law firm supervision of associates. They all applied here because these were New York lawyers and the applicable provisions were entirely consistent with and simply reinforced the cognate Alabama Rule 5.1 provisions:

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

(b) A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer in the firm conforms to the disciplinary rules.

(c) A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is

C. The Associates' Abandonment

But then, when the young associates left for new positions, matters turned really ugly. These two young lawyers had entered appearances in a court of law, appearances that required a special motion and the acquiescence of the court, entries of appearance that led the client to believe that these lawyers were representing Mr. Maples, were his true champions, there to protect him at every turn.[11] And yet these two took not one step to notify the court before whom they had prayed for dispensation to appear – the very same court to which they made representations that, if the court needed to give the client notice of any developments in the case, the court should contact them by sending the mail to 125 Broad Street in New York City, New York, Sullivan & Cromwell's offices.[12]

---

being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

N.Y. Code Prof'l Resp. DR 1-104, 22 N.Y.C.R.R. § 1200.5 (2002).

[11] Ala. R. Crim. P. 6.2(b) required a "duty of continuing representation" unless counsel filed a written motion to withdraw, a procedure designed to protect the interests of the defendant and to allow the court to appoint new counsel. *See Esters v. State*, 894 So. 2d 755, 760-61 (Ala. Crim. App. 2003).

[12] It also appears from the record here that no one at Sullivan & Cromwell—associates or partners—ever contacted the client. If that is so, this is another professional violation of Alabama Rule 1.4 that only exacerbated the other breaches. But there is no need to resolve that issue at this juncture since the failures vis á vis the courts establish the abandonment.

This frontal assault on the court seems abandonment enough. Yet it is actually far worse than it appears at first blush. This is because the Alabama Rules of Professional Conduct, just like the ethics rules of every jurisdiction in America, do not permit a lawyer to withdraw from a matter before a tribunal, even if the lawyer has compelling grounds therefor, without notice to and permission of the court. These rules are designed to prevent both client abandonment and any affront on the dignity and processes of the court caused by an unapproved, let alone surreptitious, withdrawal.

So, if they wished to cease representing Petitioner, these young lawyers were obligated to withdraw in a manner consistent with the Alabama Rules of Professional Conduct and other applicable law. This would have involved notifying their client, Ala. R. Prof'l Conduct R. 1.4, 1.16 (2002); RLGL §§ 20, 33(1) (2000), seeking the court's permission to withdraw, and taking steps necessary to protect the client's interests. *See* 7A C.J.S. *Attorney & Client* § 270 (2011) (citing *Patterson v. State*, 288 So. 2d 446, 448 (Ala. 1974)) ("An attorney who has appeared as the attorney of record in a cause cannot effectively terminate the relation by withdrawal until he or she has made application to the court and obtained leave to make a formal withdrawal of record."); *cf. Esters v. State*, 894 So. 2d 755, 761-63 (Ala. Crim. App. 2003) (Alabama Rules of Criminal Procedure require a duty of continuing representation until the trial court grants a formal written motion to withdraw). Petitioner's lawyers failed to meet these standards when they left the case without substituting counsel or notifying the court of their departure. As a result, the two associates, who terminated their

representation of Mr. Maples when they left the firm, remained the only Sullivan & Cromwell counsel of record during this critical period. That abandonment is enough to establish cause to excuse the default.

D. Sullivan & Cromwell's Abandonment

The role of any other Sullivan & Cromwell, lawyers who were involved in the case, and the law firm itself, simply reinforces the dereliction. The firm had responsibility for its departing associates, this client and the case, Ala. R. Profl Conduct R. 5.1; RLGL § 14 cmt. h (2000) (client-lawyer relationships with law firms); RLGL § 58 (vicarious liability). The firm knew not only that these associates were leaving, but also knew that one was going to Belgium to work for the European Commission and the other to clerk for a federal judge in New York. The firm was on high profile actual notice that these two lawyers could not possibly take Mr. Maples's case – or, for that matter, any other Sullivan & Cromwell matter – with them.[13]

Nonetheless, the firm took no steps to make sure that the two departing lawyers told the court of their upcoming departures, took no steps to make sure court permission was obtained for their withdrawal, and failed to make sure that any substitute lawyers (even if they were going to allegedly work in their "individual capacity") petitioned for *pro hac vice* admission and

---

[13] While it is most likely that their departure, like most firm departures, was announced to everyone, at a minimum every partner who supervised these two associates in non-pro bono matters was well aware of these developments.

substitution of counsel. This was anything but gross negligence; it was the affirmative flouting of court procedures the ignoring of which is the very essence of abandonment. *See In re Kiley*, 459 Mass. 645 (2011).

In fact, all these steps not only had to be pursued, they had to be pursued quickly because an important proceeding – a capital case of all things – renders even a short abandonment of the client potentially a matter of life or death. Moreover, the fact that all of this could have been accomplished with little effort any time during the ten months before the long awaited decision came down, only adds to the tragedy of the consequences that followed.

Sullivan & Cromwell had about 300 days to make things right. Instead, the firm did nothing—thus abandoning Mr. Maples. That this elite firm of over 500 lawyers did not bestir itself for that long only compounds the seriousness of the client's abandonment. It is no stretch to conclude at that point that Sullivan & Cromwell had gone beyond abandonment, by exalting the discredited notion of individual responsibility of young, inexperienced, departed firm associates representing this death row inmate over the firm's fiduciary obligation to the client, sitting on death row.

The reasons for these rules are manifest. First, a lawyer "should not accept representation in a matter unless it can be performed competently, promptly, without conflict of interest and to completion." Ala. Rules of Profl Conduct R. 1.16 Comment (2002). The lawyer's client is entitled to

rely on that principle unless he is given notice to the contrary. Ala. Rules of Prof'l Conduct 1.3 Comment (2002) ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."); RLGL § 19 (2000). Second, any right to withdraw can be trumped by the court's authority to order the lawyer to continue the representation. Ala. Rules of Prof'l Conduct R. 1.16(c) (2002); *see, e.g.*, *Patterson v. State*, 288 So. 2d at 448 (denial of right to withdraw is within trial court's discretion). This rule permits the court to discharge its own obligations: a lawyer's initial appearance "assures [the] court that [the] client's rights are being protected by a duly licensed member of the bar," and his motion to withdraw ensures "that the court may, if necessary, take steps to see that valuable rights are not thereby lost." *Myers v. Miss. State Bar*, 480 So. 2d 1080, 1092-93 (Miss. 1985), *cert. denied*, 479 U.S. 813 (1986) (affirming lawyer's two-year suspension from practice for failing to file a timely appeal on behalf of a criminal defendant client and failing to properly withdraw as counsel); RLGL § 32(5) (2000).

More generally, a lawyer must wind down a representation in a way that protects the interests of the lawyer's client. Ala. Rules of Prof'l Conduct R. 1.16(d) (2002); RLGL § 32(4) (2000). If withdrawal cannot be accomplished without a material adverse effect on the client's interests, and if a lawyer lacks good cause for withdrawal, the representation may not be terminated as a matter of professional responsibility. Ala. Rules of Prof'l Conduct R. 1.16(b) (2002); RLGL § 32(3) (2000). Even where withdrawal is justified, however, the lawyer seeking to withdraw must take protective steps to the extent

reasonably practicable. *Id.* R. 1.16(d). This includes "allowing time for employment of other counsel." *Id.* Moreover, a court may deny a motion to withdraw where substitute counsel has not been retained. *See, e.g., Farkas v. Sadler*, 375 A.2d 960, 963 (R.I. 1977) (motion to withdraw properly denied where trial was underway and substitute counsel had not been retained). In addition, all parties must be notified of any substitution of counsel "so they can know upon whom to make service of orders." *Wait v. Second Judicial Dist. Court*, 407 P.2d 912, 915 (Nev. 1965).

The Sullivan & Cromwell lawyers ignored the ethical obligations surrounding the termination of a representation. They did not seek the court's permission to withdraw; they did not arrange for substitution of counsel; and they did not give Petitioner the opportunity to protect himself in a timely way. Rule 1.16 exists precisely to prevent this type of abuse and, ultimately, to prevent abandonment.

To compound these indignities, Respondent now asserts that Petitioner, who was the victim of his lawyers' disregard for the client, the rules and the courts, is somehow responsible for their misconduct. This cannot be true where Petitioner was unwittingly left with no representation whatsoever. Where counsel of record is not actually on the case, and has not secured substitute counsel of record, the client has been abandoned.

II. This Case is Not About the Mail Room

In the legal press this case has garnered outsized attention because a) it involved a high

profile law firm and b) the mailroom at Sullivan & Cromwell returned a letter from a court to the sender because the addressees were "no longer at firm." But this case, from a professional responsibility point of view, is not about the mailroom. Yes, it is unthinkable to *Amici Curiae* that the lawyers at Sullivan & Cromwell did not have in place procedures that required any correspondence from a court to a departed lawyer to be opened forthwith and the departed lawyer immediately notified of the contents (if in fact the departed lawyer took the matter with him or her) and arrange for prompt delivery as directed, forwarding the communication by overnight delivery because any other course would run the unnecessary risk that some deadline would lapse in the interim. Ala. Rules of Prof'l Conduct R. 5.3(a) (2002); N. Y. Code Prof'l Resp. DR 1-104(c), 22 N.Y.C.R.R. § 1200.5 (2002); RLGL § 32(3) (2000). But this was not abandonment; abandonment had long since taken place, when the two associates left and neither they nor any other Sullivan & Cromwell lawyer took one affirmative step vis á vis the court, creating a representational void which permitted this headline-grabbing sequence to occur. [14]

---

[14] Petitioner has explained at great length why, notwithstanding the misconduct of the Sullivan & Cromwell lawyers, the Clerk of the Court had independent responsibilities to assure that Mr. Maples was on notice of the returned order and the need to act promptly. The fact that the law firm did not have essential procedures in place to deal with mail addressed to departed lawyers does not obviate the independent failure on the part of the State.

III. Local Counsel Abandoned the Client

Although the multiple abandonments by Sullivan & Cromwell lawyers more than warrants relief for Mr. Maples, the abandonment by local counsel also suffices. That abandonment of Mr. Maples occurred when local counsel agreed to let Ms. Ingen-Housz and Mr. Munanka associate him as local counsel, while at the same time reaching an understanding (apparently with these same two inexperienced second year associates) that he would do no more in the case. So this was an abandonment *ab initio* and it was one that was forcefully and unabashedly announced to the New York lawyers. In other words, local counsel, unlike Sullivan & Cromwell, admitted that he severed whatever tenuous lawyer-client relationship he had established with Mr. Maples by simply entering his appearance and making the lone motion urging the Court to admit the out-of-staters to represent Mr. Maples. That alone would be enough to conclude that Mr. Maples was abandoned. But when this conduct is considered in a professional responsibility context, the extraordinary nature of this abandonment – shredding rules designed to prevent this very result – becomes even clearer.

First, the courts of Alabama had established a court rule governing the admission of lawyers not admitted to the Alabama bar, a rule similar to that established in most jurisdictions. Ala. Rules Governing Admission to the Ala. State Bar R. VII (2002) [hereinafter Ala. Bar Admission Rule]. It permitted, even welcomed, out-of-jurisdiction lawyers, but if, and only if, there was local counsel retained in the matter. Generally speaking, the

desire of the Alabama Court to guarantee such an arrangement is totally understandable. *See Piper v. S. Ct. of New Hampshire*, 470 U.S. 274 (1985) (encouraging adoption of such rules in lieu of prohibitions based on residency requirements). *cf.* Pet. 5, 30-31 n.4. Only local counsel is a member of the state bar. Only local counsel has been examined on Alabama law and procedure. Only local counsel knows the local judiciary, local customs and local court personnel. Only local counsel is within the jurisdiction for court hearings and conferences on short notice. Only local counsel can review the out-of-jurisdiction work product for the merits and conformity to local practice. In short, under then-existing rules of practice, local counsel was essential to maintaining the integrity of judicial proceedings into which out-of-state counsel wished to insert themselves.

To emphasize this important role, Alabama also adopted another rule which made local counsel responsible on a joint and several basis for everything that occurred in the proceeding in which foreign counsel appeared. Ala. Bar Admission Rule VII(c) (2002). One could not imagine a more pointed way of emphasizing the Alabama court's view of the critical nature of the local counsel role. The court warns local counsel that any lapses in the proceedings on local counsel's side of the matter will be the entire responsibility of the lawyer who agrees to assume that position as an officer of the court, a court that has adopted rules of professional conduct governing this and every aspect of how lawyers must fulfill their duties to clients and the courts to which out-of-state counsel, by virtue of the *pro hac* admission, are subject. Ala. Rules of Prof'l Conduct

R. 3.4(c) (2002) ("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists").

Second, in entering into a lawyer-client relationship with Mr. Maples by filing his appearance in the matter, local counsel was bound by two sections of Rule 1.2 of the Alabama Rules of Professional Conduct. First, the rule required that the client define the objectives of the representation, Ala. Rules of Prof'l Conduct R. 1.2(a) (2002). Second, the rule prohibited the lawyer from imposing on the representation a scope limitation to which the client did not consent. *Id.* R. 1.2.(c). *See* RLGL § 19, cmt. c ("a contract limiting a lawyer's role during trial may require court approval.") Accordingly, Rule 1.2(c) required "consent after consultation" as a precondition to any scope limitation. *Id.* But here, with no consultation with court or the client, supposedly based on an undocumented agreement with Sullivan & Cromwell – a law firm which had absolutely no authority to agree – the local counsel limited the objectives of local counsel's representation to securing the admission of two New York lawyers. He then also limited the scope of the representation to that one item – local counsel even being unwilling to open and forward any mail that came his way – and concluded that was perfectly okay. In so doing, he affronted the dignity of the courts, violated the rule governing the responsibility of local counsel, breached every fiduciary duty he

owed his client and gave to this Court Exhibit 2 of a principal-agent relationship torn asunder. [15]

IV. Sullivan & Cromwell's Post-Default Conduct Ratified and Reinforced Its Earlier Abandonment

Sullivan & Cromwell indicates it learned of the disaster caused by its abandonment of Mr. Maples when his stepmother called the firm because she had learned of the adverse decision. One would expect that Sullivan & Cromwell then would have ended the firm's abandonment of the client by seeking to protect his interests. But it did not, and its actions just added to Mr. Maples's travails.

From the moment Sullivan & Cromwell learned of the tragic results caused by its abandonment of the client, the firm had an impossible conflict of interest. *See* Ala. Rules of Prof'l Conduct R. 1.7(b) (2002) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests"); *id.* R. 1.7 cmt. ("If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."). And the conflict was non-waivable because no reasonable lawyer could conclude under these circumstances that he or she would be able to provide competent representation to the client. *Id.* R. 1.1.

---

[15] Even where allowed, special or limited appearances create professional relationships and obligations to clients. *See, e.g., Streit v. Covington & Crowe*, 82 Cal. App. 4th 441 (2000).

Thus, in forging ahead, the firm violated the most fundamental duty owed by lawyers to their clients: the duty of loyalty. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984) (stating that loyalty is "perhaps the most basic of counsel's duties"). Suddenly, the firm's ability to represent its client – already in tatters as a result of the firm's neglect of its fundamental duties to both court and client – was further compromised by the firm's interest in restoring its own reputation. And unlike so many other loyalty trangressions, here the effects on the firm's continued representation are manifest and devastating.

To start, as soon as the firm learned what had happened, it was required to notify the client of the conflict of interest and see to it that substitute counsel was retained who was not laboring under a conflict and who immediately could have raised the claim of Sullivan & Cromwell's abandonment in an unfettered way. *See* RLGL § 20 cmt. c (2000). ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client."); *see also Olds v. Donnelly*, 696 A.2d 633, 643 (N.J. 1997) ("The Rules of Professional Conduct . . . require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest."); *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

The record does not reveal any suggestion that Sullivan & Cromwell ever discussed this course of

action with Mr. Maples, explained its conflict to the client, or suggested that the firm's own conduct might gave rise to its client's entitlement to relief from the missed deadline. The record is clear, however, that Sullivan and Cromwell did not arrange for independent counsel who could address these issues, at least until after the Eleventh Circuit's decision in the federal habeas action when new counsel for Mr. Maples entered its appearance. Instead, soon after the default, Sullivan & Cromwell lawyers entered their appearances in the case and proceeded to purport to represent Mr. Maples, who had no idea that a serious conflict now infected his lawyers' approach to securing him relief.

But even a cursory review of what happened next demonstrates that by now Sullivan & Cromwell was also representing its own interests, the client left without an unconflicted lawyer who could actually represent Mr. Maples and only Mr. Maples. Beyond the failure to recognize the conflict and find substitute counsel, three examples demonstrate this point.

First, Sullivan & Cromwell prepared an affidavit for Mr. Maples in which he swears: "My lawyers at Sullivan & Cromwell in New York didn't get the decision from the Alabama Court in time." Maples Aff. JA 253. One is flabbergasted to understand how Sullivan & Cromwell put those words in this client's affidavit. First, Mr. Maples was not a witness to what happened to the critical court document. Second, it was only because of the firm's prior abandonment that the communication, which went right to the Sullivan & Cromwell mail room, did not land on a Sullivan & Cromwell

lawyer's desk. And this is precisely what any law firm, other than Sullivan & Cromwell, would have put into Mr. Maples's affidavit: "It was my lawyers' abandonment of me that caused the missing of the deadline." Yet when one reads the Sullivan & Cromwell version it calls to mind the story of the little boy, holding an Oreo, standing beside the broken cookie jar, crying "it broke."

Second, the same affidavit has Mr. Maples reciting: "I don't think my lawyers did anything wrong." Maples Aff. JA 253. Again, how could Sullivan & Cromwell, representing Mr. Maple's interests, advise him to sign this exculpatory statement? Any other firm, not operating under an impossible conflict, would have put as much distance between Mr. Maples and his lawyers as possible, asserting that Sullivan & Cromwell did the client "wrong," abandoned him and for that reason the court should relieve the hapless, ignored, and misled client of the transgressions of his counsel.[16]

Third, no one from Sullivan & Cromwell stepped forward to take responsibility for the debacle. To the contrary, although Sullivan &

---

[16] Sullivan & Cromwell also violated the Alabama Rules of Professional Conduct in another way by having the client swear that his lawyers did not do anything wrong. Rule 1.8(n) provides in relevant part: "A lawyer shall not ... settle a claim for [malpractice] liability with an unrepresented client ... without first advising that person in writing that independent representation is appropriate therewith." Here the "settlement" was worse because the client not only was misled into blessing his lawyer's conduct, he also was persuaded to arguably waive his strongest argument for relief from the missed deadline. Ala. Rules of Prof'l Conduct R. 1.8(n) (2002).

Cromwell represented to the court that other lawyers at the firm were involved with the representation at the time of the crucial departure, *not one of them* took responsibility for the default. Nor did they concede that abandonment is what occurred here. Mr. DeLeeuw says he was involved in the case from well before the event in question;[17] but his affidavit is otherwise devoid of any explanation of what the word "involved" means, and he also told the Eleventh Circuit that the S&C attorneys were just "awaiting any further proceedings." Nor is there any assumption of responsibility or culpability, something any unconflicted lawyer would have immediately identified, criticized, argued from, and based requested relief for Mr. Maples upon – just as *Amici Curiae* have done here.

V. Sullivan & Cromwell's *Post Hoc* Justification Reflects Unethical Conduct

When the detailed facts of how Sullivan & Cromwell handled this particular matter (to the extent they are reflected in the record)[18] are considered, Sullivan & Cromwell's conduct becomes even more problematic. This was a habeas corpus proceeding on behalf of a client convicted of capital murder, the brain surgery of legal matters. No law firm could reasonably conclude – without a direct

---

[17] "I have been involved in this case since the summer of 2001." DeLeeuw Aff. ¶ 1.

[18] The record is hardly complete, in part because Sullivan & Cromwell, has not provided the Alabama courts with a complete account of what occurred.

violation of the applicable rules of professional conduct – that it would permit two first or second year associates, essentially fresh out of law school without apparent supervision, to handle this matter, ironically a matter whose centerpiece was the fact that trial counsel told the jury they "may appear to be stumbling around in the dark." R. 3081-82. Indeed, both Rule 5.1 of the Alabama Rules of Professional Conduct and New York's DR 1-104 made this clear.[19] Sullivan & Cromwell's awkward attempts, therefore, to put space between the responsibility of the two departing lawyers and Sullivan & Cromwell, from a professional responsibility point of view, must be totally unavailing.[20]

Mr. Maples, facing a sentence of death – with only a successful habeas proceeding standing between him and lethal injection – apparently was supposed to rely on two first year associates to handle this matter. Taking the idea that all pro bono matters are handled on an individual basis to an unfortunate limit, Sullivan & Cromwell, it would appear, decided that Mr. Maples's case was so elementary, demanding so little by way of

---

[19] *See also* RLGL § 11 (2000).

[20] Surprisingly, Sullivan & Cromwell seems to admit lack of supervision in pro bono matters. The firm told Vault Guide to Law Firm Pro Bono Programs in answer to the question, "Is there partner supervision on all pro bono matters?" "At least one partner is available to answer questions and discuss issues that arise." That, in the view of *Amici Curiae*, is not the supervision required of the applicable rules and standard of care. *Vault Guide to Law Firm Pro Bono Programs* 674 (3d ed. 2007).

background or experience, it could be assumed by its most junior lawyers, those at the bottom of the experience curve, with not one partner entering an appearance for the client. Of course, the client did not know how unlikely it would be that any non-pro bono client of the firm would go partner-less on any complex litigated matter, let alone one where life or death was at stake. Nor was the client likely to appreciate the inexperience of his lawyers or recognize how rule-violating such an approach was. Ala. R. Prof'l Conduct R. 5.1(a) (2002) ("A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."); Ala. R. Prof'l Conduct R. 6.2 Comment (2002) ("An appointed lawyer has the same obligations to the client as retained counsel"). As a result, one can easily see how Sullivan & Cromwell ran right through the red light of the self-evident standard of care which required the firm to staff the matter properly from the beginning.

To make matters worse, Respondent asserts that during the federal habeas proceedings Sullivan & Cromwell waived the argument that Maples was abandoned by Sullivan & Cromwell lawyers. Petitioner has explained why, despite this assertion, the question presented is properly before the Court. Especially given the obvious conflict of interest under which Sullivan & Cromwell was proceeding in the federal habeas action, it would be entirely inappropriate to say that these arguments were waived by the very lawyers who did the abandoning, thereby only adding to the unthinkable predicament

that Mr. Maples now faces as the result of his abandonment by counsel.

VI. Conclusion

The forgoing is a sad tale, one *Amici Curiae* take no pleasure in addressing. But it also is not the end of the story. In *Amici Curiae*'s view, the sins of the lawyer should never be visited upon the client because the lawyer-client relationship is different in kind from that of other principal-agency relationships. That is particularly so in a capital case where the remedy of suing the lawyer for breach of fiduciary duty provides no remedy at all. But this Court need not go there, because in this case the abandonment of Mr. Maples by all his lawyers left him with no agents—none at all—to represent his interests at this most critical of junctures. As a result, there is no basis for asserting that Mr. Maples should be stuck with the terrible consequences of not being represented by counsel.

Respectfully Submitted

LAWRENCE J. FOX
Counsel of Record
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, Pennsylvania 19103
(215) 988-2700
Lawrence.Fox@dbr.com

Counsel for Amici Curiae

SUSAN D. REECE MARTYN
Stoepler Professor of Law and Values
UNIVERSITY OF TOLEDO COLLEGE OF LAW
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 530-4212
SUSAN.MARTYN@utoledo.edu

Counsel for Amici Curiae

APPENDIX

Appendix A

IDENTITY OF AMICI CURIAE

Richard Abel is Michael J. Connell Professor of Law Emeritus at U.C.L.A. He is the author of many books, including *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (2008).

Aviva Abramovsky teaches Professional Responsibility and is the Associate Dean for Special Projects and an Associate Professor of Law at Syracuse University College of Law.

Dr. Gregory B. Adams has been a law professor at the University of South Carolina School of Law for more than 30 years. He specializes in lawyers' and judges' ethics, subjects on which he is a recognized expert. He is also the founding Director of the Program on Judicial Ethics, Selection, Accountability & Independence.

James J. Alfini is Dean Emeritus and Professor of Law at South Texas College of Law, where he served as President and Dean from 2003 to 2009. He is widely published in the field of judicial ethics and is a co-author of *Judicial Conduct and Ethics*, published by Lexis and in its 4th Edition (2007).

James Ellis Arden is a member of the Association of Professional Responsibility Lawyers and the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association.

Robert H. Aronson was a Commissioner on Uniform State Laws for 15 years and has been a

member of the Washington Legislative Ethics Board. From 1987-1994, he was a member of the National Conference of Bar Examiners Multistate Professional Responsibility Exam Drafting Committee. In 1991, he was Chair of the Association of American Law Schools Professional Responsibility Section. He is a co-author of a casebook, *Problems, Cases and Materials on Professional Responsibility* (West 1985; 2nd ed. 1995; 3rd ed., 2004) and a book, *Professional Responsibility in a Nutshell* (West, 1980; 2nd ed., 1991).

Robert Ashford is a Professor of Law at Syracuse University College of Law and the founder and principal organizer of the Section on Socio-Economics of the Association of American Law Schools. He is also a member of the Editorial Board of the Journal of Socio-Economics, the American Law Institute, and the Athens Institute for Education and Research. His subjects include Binary Economics, Business Associations, Public Corporations, Professional Responsibility, Secured Transactions, and Securities Regulation.

Benjamin H. Barton is the Director of Clinical Programs and a Professor of Law at the University of Tennessee College of Law. Cambridge University Press recently published his book, *The Lawyer-Judge Bias in the American Courts*, and he is the winner of the 2010 LSAC Philip D. Shelton Award for outstanding research in legal education.

Debra Lyn Bassett is the Justice Marshall F. McComb Professor of Law at Southwestern Law School in Los Angeles, California. She is a co-author of a Professional Responsibility Casebook, *Problems*

in Legal Ethics (with Schwartz, Wydick & Perschbacher) (2010).

Susan J. Becker is a Professor who teaches Legal Profession, Civil Procedure and other courses from a practice-oriented perspective at Cleveland-Marshall College of Law. She is a co-author of *The Law of Professional Conduct in Ohio* (Lexis-Nexis 2009-2010).

Paul D. Bennett is a Clinical Professor of Law at the University of Arizona. He has been teaching Professional Responsibility at Arizona for the last 14 years and has taught Professional Responsibility at the University of San Diego and the University of Washington. In 2006 he received the President's Award from the State Bar of Arizona for co-chairing its Task Force on Professionalism.

Laura Berend is a Professor at the University of San Diego where she teaches Criminal Justice and Ethics in Criminal Practice.

Richard Bourne is a Professor of Law at the University of Baltimore where he teaches Professional Responsibility, Civil Procedure, and Remedies.

William J. Bridge has been a Professor of Law at Southern Methodist University Dedman School of Law since 1977, teaching Professional Responsibility, Evidence, Criminal Law, and Comparative Law.

Darren R. Cantor has represented and advised Respondents in the Colorado disciplinary process

since 2001. where he has taught ethics to lawyers, conducted CLE's for the Colorado Bar Association, Colorado Women's Bar Association, and Colorado Criminal Defense Bar throughout that time, in addition to his criminal defense practice in the state and federal courts.

Robert F. Cochran, Jr. is Louis D. Brandeis Professor of Law and Director of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine University School of Law. He is the co-author of *Lawyers, Clients and Moral Responsibility* (2009) and *Cases and Materials on The Legal Profession* (2003).

Sherman L. Cohn is a Professor of Law at Georgetown University Law Center. He has served for the U.S. Department of Justice from 1958 to 1965. From 1957 to 1958, he was a Law Clerk to the Honorable Charles Fahy, U.S. Court of Appeals for the D.C. Circuit. Professor Cohn was also the President of American Inns of Court from 1985 to 1994.

Liz Ryan Cole is Professor and Director of The Semester in Practice (SiP) at Vermont Law School where she teaches Legal Ethics in the Practice of Law both as a component of the SiP practicum, and as a stand-alone course in the classroom.

Teresa S. Collett is a Professor of Law at the University of St. Thomas School of Law in Minnesota. She is an elected member of the American Law Institute and the co-author of a textbook on the professional responsibilities of lawyers.

Robin Morris Collin is Norma J. Paulus Professor of Law at Willamette University College of Law, where she teaches Legal Profession, Remedies, and Criminal Justice.

Roger C. Cramton is Robert S. Stevens Professor Emeritus Professor of Law and former Dean at Cornell Law School. He is the co-author of *The Law and Ethics of Lawyering* (2010) and was an advisor to the Restatement (Third) of the Law Governing Lawyers.

Dennis Curtis is a Clinical Professor of Law and Professional Lecturer at Yale Law School. He has taught Professional Responsibility for 30 years and started the first law school clinic in which students worked with state grievance committees to prosecute lawyers accused of violations of Rules of Professional Responsibility.

Joshua P. Davis is the Associate Dean for Faculty Scholarship, Professor, and the Director of the Center for Law and Ethics at the University of San Francisco School Of Law. Professor Davis teaches and writes, *inter alia*, in the areas of complex litigation and legal ethics.

Meredith J. Duncan is George Butler Research Professor of Law at the University of Houston Law Center, where she teaches and writes in the areas of Professional Responsibility, Legal Ethics, Torts, and Criminal Law.

A. James Elliott, is the Associate Dean and teaches Legal Profession at Emory University School of Law. He was in private practice with Alston & Bird LLP

in Atlanta for 28 years prior to returning to the academy.

Marie A. Failinger is a Professor of Law at Hamline University School of Law. In the past, she has taught From Rules to Ethics at Hamline and she publishes articles on legal ethics.

Barbara Glesner Fines is the Associate Dean for Faculty and Ruby M. Hulen Professor of Law at the University of Missouri-Kansas City.

Susan Saab Fortney serves as the Interim Dean and Paul Whitfield Horn Professor at Texas Tech University School of Law. Since 1993, her research, service and teaching have focused on legal ethics issues.

Lawrence J. Fox is a partner at Drinker Biddle & Reath LLP. He is also currently the Visiting Lecturer of Law and the Crawford Lecturer at Yale Law School, teaching Ethics and Professional Responsibility, while also serving as the Supervising Lawyer at the newly established Ethics Bureau there. Mr. Fox was formerly a lecturer on law at both Harvard Law School (2007-2010) and The University of Pennsylvania Law School (2000-2008), and has authored many articles and books on Professional Responsibility. He is the former Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility and has served as an advisor to the Restatement (Third) of the Law Governing Lawyers.

Monroe H. Freedman is a Professor of Law at Hofstra University and the author of *Understanding Lawyers' Ethics* (3d Ed. 2004) (with Abbe Smith).

Marsha B. Freeman is a Professor of Law at Barry University School of Law and teaches in the areas of Professional Responsibility, Property, Administrative Law, and Family Law. She writes primarily on social and policy issues facing children and families and has served on the Florida Supreme Court Advisory Board for Children and Families and the Family Law Advisory Board for the 9th Judicial Circuit in Orange County, Florida.

David A. Green is a Professor of Law at North Carolina Central University School of Law where he teaches and writes in the areas of Professional Responsibility, Torts, Civil Procedure, Disability Law, and Employment Discrimination.

Leonard Gross is a Professor of Law Emeritus at Southern Illinois University School of Law and serves as Reporter to the Illinois Judicial Conference committee on Judicial Ethics and its committee on Sanctions in Civil Cases.

Melissa Hart is an Associate Professor and Director of the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado School of Law.

Louise Hill is a Professor of Law at Widener University School of Law. She is the author of *Lawyer Advertising* and has taught Legal Ethics for 30 years.

Joseph Gordon Hylton is a Professor of Law at Marquette University and currently a Visiting Professor of Law at the University of Virginia. He teaches Professional Responsibility at both Marquette and the University of Virginia.

Donald Joseph practiced in the litigation department of a major Philadelphia law firm for 25 years before teaching law where he has continued for the past 15 years. Since 2000, he has taught at Rutgers Law- Camden. His area of focus is Professional Responsibility.

Peter Joy is on the faculty of Washington University where he teaches Legal Profession, Trial Practice & Procedure, and directs the Criminal Justice Clinic. He writes about access to justice, legal ethics, and criminal justice issues, and he is the co-author of *Do No Wrong: Ethics for Prosecutors and Defenders* (ABA 2009).

Ann Juergens is the Co-Director of Clinics and a tenured Professor of Law at William Mitchell College of Law in St. Paul. She has practiced law in a variety of settings – legal services, city attorney, private practice, law school clinics – since 1976 and began teaching Professional Responsibility in 1990.

Peter Keane is a Professor of Law and Dean Emeritus at Golden Gate University School of Law. He is the former President of the Bar Association of San Francisco and former Vice-President of the state Bar of California.

Sung Hui Kim is an Acting Professor of Law at U.C.L.A. School of Law. She writes and teaches in

the areas of Professional Responsibility, Business Associations, and Securities Regulation.

Charles Kindregan has taught courses in Professional Responsibility, Family Law and Assisted Reproductive Technology as a member of the resident faculty at Suffolk University School over a period of 45 years.

Renee Newman Knake is an Assistant Professor of Law, teaching Professional Responsibility at Michigan State University College of Law. "Professor Knake's most recent publication is *Prioritizing Professional Responsibility and The Legal Profession: A Preview of The U.S. Supreme Court's 2009-2010* Term, 5 Duke Journal of Constitutional Law and Public Policy 1 (2009)."

Michael I. Krauss is a Professor of Law at George Mason University School of Law in Arlington, Virginia, where he teaches Torts, Legal Ethics and Jurisprudence. His most recent publication is *Principles of Products Liability* (©Thomas-West, 2011).

Maury Landsman is an Emeritus Clinical Professor at the University of Minnesota Law School and was a Clinical Professor from 1986-2008. Professor Landsman taught Ethics and Professional Responsibility from 1998-2008.

Carol M. Langford is an Adjunct Professor of Law at the University of San Diego and the co-author of *Legal Ethics in the Practice of Law* (2007).

Lisa G. Lerman is a Professor of Law and Coordinator of Clinical Programs at The Catholic University of America. She is a co-author (with Philip G. Schrag) of *Ethical Problems in the Practice of Law* (2d Ed., Aspen 2008), co-author of *Learning from Practice* (2d Ed. West 2007), and an author of numerous articles in the field of legal ethics, including *Lying to Clients*, University of Pennsylvania Law Review, 1990.

Howard Lesnick is Jefferson B. Fordham Professor at the University of Pennsylvania Law School, teaching Legal Profession and Religion Law & Lawyering.

David Luban is a University Professor and Professor of Law and Philosophy at Georgetown University Law Center in Washington, DC. He is the author of *Lawyers and Justice: An Ethical Study* (1988), *Legal Ethics and Human Dignity* (2007) and the co-author of *Legal Ethics* (2008).

Myles V. Lynk was a Visiting Professor of Law at Duke University School of Law in 2010 and is the Peter Kiewit Foundation Professor of Law and the Legal Profession at Arizona State University in Tempe, Arizona. A member of the ALI, Myles teaches Legal Ethics and Professional Responsibility.

Peter Margulies is a Distinguished Research Professor of Law at Roger Williams University School of Law, teaching Professional Responsibility, Immigration Law and National Security Law.

Ellen Marrus is George Butler Research Professor of Law and Director of the Center for Children, Law & Policy at the University of Houston Law Center.

Susan D. Reece Martyn is Stoepler Professor of Law and Values at the University of Toledo. She is the author (with Lawrence J. Fox) of *Red Flags: A Lawyer's Handbook on Legal Ethics* (ALIABA 2d Ed. 2010), *The Ethics of Representing Organizations: Legal Fictions for Clients* (Oxford 2009), and *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility* (Aspen 2d Ed. 2008). She has served as a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility, as an advisor to the Restatement (Third) of the Law Governing Lawyers, and as a member of the Ohio Supreme Court Task Force on the Rules of Professional Conduct.

Judith L. Maute is William J. Alley Professor of Law at the University of Oklahoma College of Law in Norman, Oklahoma, where for over 25 years she has studied lawyers' fiduciary duties to communicate and comply with clients' lawful instructions. *See*, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. Davis L. Rev. 1049-1115 (1984).

James McGrath is Professor of Law at Texas Wesleyan, teaching Professional Responsibility and Torts.

Judith A. McMorrow is a Professor of Law at Boston College Law School. Professor McMorrow teaches and writes in the area of Professional

Responsibility, with a particular focus on the federal regulation of lawyers.

Carrie Menkel-Meadow is Chancellor's Professor of Law at the University of California, Irvine School of Law and A. B. Chettle Jr. Professor of Law at Georgetown University Law School. She is the author or numerous books and articles on alternative dispute resolution, including *What's Fair: Ethics for Negotiators (with M. Wheeler)* (2004) and *Mediation: Practice, Policy and Ethics*, (2006).

Thomas Metzloff is a Professor of Law at Duke University School of Law, where he teaches courses in Legal Ethics.

Kevin E. Mohr is a Professor at Western State University College of Law. He is the Former Chair of the State Bar of California Committee on Professional Responsibility and Conduct.

James E. Moliterno is the Vincent Bradford Professor of Law at Washington & Lee University. He has taught lawyer ethics for 29 years at six U.S. law schools and in seven other countries, and is author of several books on lawyer ethics issues, including *Cases and Materials on the Law Governing Lawyers* (2008).

Edward Ohlbaum is a Professor and the Director of CLE and the Trial Advocacy Program at Temple University School of Law. He teaches Professional Responsibility and Evidence, and has authored *Ohlbaum on the Pennsylvania Rules of Evidence* (2010) and co-*authored Pennsylvania Benchbook for Criminal Proceedings* (1999).

Arden J. Olson is a shareholder at Harrang Long Gary Rudnick PC in Eugene, Oregon. He is a former member of the ABA Standing Committee on Legal Ethics & Professional Responsibility, and a current member of the ABA Standing Committee on Professionalism.

William Wesley Patton is a Professor and J. Allan Cook and Mary Schalling Cook Children's Law Scholar at Wittier Law School. He is also a lecturer at U.C.L.A. David Geffen School of Medicine in the Department of Psychiatry.

Rex Perschbacher has been a University of California Davis faculty member since 1981 and holds the Daniel J. Dykstra Chair, teaching Professional Responsibility and Civil Procedure. He is co-author of *Problems in Legal Ethics*, now in its 9th edition, and *California Legal Ethics*, now in its 7th edition.

Lee A. Pizzimenti is the Associate Dean for Student Affairs and Professor of Law at the University of Toledo College of Law.

Brenda Jones Quick is a Professor Emeritus at Michigan State University College of Law. She has also been a Visiting Professor of Law at Barry University School of Law in Orlando and the University of Arizona College of Law in Tucson.

Nancy B. Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Her specialties include bankruptcy ethics and ethics in corporate governance.

Cruz Reynoso is a Retired Associate Justice of the California State Supreme Court, Professor Emeritus at the University of California at Davis, and Past Vice Chair of the United States Commission on Civil Rights.

Patricia E. Roberts is a Clinical Assistant Professor of Law and Director of Clinical Programs at William & Mary Law School. She has taught Professional Responsibility and ethical lawyering as part of her skills teaching, following eight years in private practice.

Shannon M. Roesler is an Assistant Professor of Law at Oklahoma City, where she teaches Legal Profession, Criminal Law and Criminal Procedure.

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law in Orange, California.

John P. Sahl is the Faculty Director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law. He has taught Professional Responsibility for more than 25 years at Akron and other academic institutions and is a frequent lecturer, author, and consultant in the field.

Jack L. Sammons is Griffin B. Bell Professor at Mercer University School of Law. He has published *Lawyer Professionalism* (1988) and served as a member of the ABA Georgia Task Force on the Death Penalty.

Maria S. Savasta-Kennedy is a Clinical Professor and the Director of the Externship Program at the University of Northern California.

Professor Andrea Kupfer Schneider is the Director of the Dispute Resolution Program at Marquette University Law School. She is the co-author of *Mediation: Practice, Policy & Ethics* (2006).

Antoinette Sedillo Lopez is a Professor at the University of New Mexico School of Law, where she engages in clinical teaching and teaches Professional Responsibility and Family Law.

Jeffrey M. Shaman is the Vincent de Paul Professor of Law at DePaul University and the co-author of *Judicial Conduct and Ethics* (2007).

Jay S. Silver is a law professor at St. Thomas University School of Law in Miami, where he teaches Criminal Law and Legal Ethics. His articles have appeared in the Vanderbilt Law Review, the Wisconsin Law Review, the William and Mary Law Review, and the Ohio State Law Journal.

Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas School of Law in Minnesota. He has taught Professional Responsibility for 17 years, co-authored a treatise on lawyer ethics with Chief Justice Mark Cady of the Iowa Supreme Court, and served as reporter for the drafting committee on the Iowa Rules of Professional Conduct.

Linda F. Smith is a Professor at the S. J. Quinney College of Law, University of Utah where she has

taught the Legal Profession course for over 20 years. She also serves on the Utah State Bar Ethics Advisory Opinion Committee.

John A. Straight is an Associate Professor of Law at Seattle University School Of Law, and co-author of *Washington Legal Ethics Desk Book*, WSBA (2003). He has taught Legal Ethics since 1976, and is a recipient on behalf of WSBA and SU of the ABA 1995 Gambrell Award for service to the profession for the creation and implementation and directing of the SU Legal Ethics Clinic.

Keith Swisher is an Assistant Professor of Law at Phoenix School of Law. He teaches Professional Responsibility and focuses his scholarship on legal and judicial ethics.

Laurel S. Terry is the Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law at Penn State Dickinson School of Law in Carlisle, Pennsylvania. She specializes in legal ethics and the international and inter-jurisdictional regulation of the legal profession.

Lance Tibbles is a Professor of Law at Capital University Law School in Columbus, Ohio, where he teaches Professional Responsibility. He has been teaching this topic for 20 years.

Manning Gilbert Warren, III holds the Harold Edward Harter Chair at Louisville, teaching Legal Profession, Business Associations, and EU Law.

W. Bradley Wendel is a Professor of Law at Cornell Law School. He is the author of *Professional*

Responsibility: Examples and Explanations (Aspen 2007) and joins as an editor on the Fifth Edition of the casebook, Geoffrey C. Hazard, et al., *The Law and Ethics of Lawyering* (Foundation Press 2010).

Charles W. Wolfram is a Professor Emeritus at Cornell Law School, teaching Legal Ethics and Professional Responsibility. He was also the Chief Reporter for the *Restatement of the Law Governing Lawyers* (2000) of the American Law Institute and the author of many other books and articles on legal ethics, including the widely-cited treatise *Modern Legal Ethics* (1986).

Nancy A. Wonch is a Professor of Law at Thomas M. Cooley Law School, teaching Professional Responsibility and Civil Procedure.

Ellen Yaroshefsky is the Clinical Professor of Law and Director of the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo School of Law. She teaches a range of courses, sponsors programs and events that provoke critical thought on issues of legal ethics.

Richard Zitrin is an Adjunct Professor of Law at the University of California Hastings College of the Law. He is the founding Director of the Center for Applied Legal Ethics at the University of San Francisco School of Law and is the co-author of *Legal Ethics in the Practice of Law* (2007).

The Ethics Bureau at Yale is a student clinic that provides professional responsibility advice and counseling for not-for-profit agencies that offer legal services to the indigent.

The views expressed herein reflect the personal opinions of *Amici Curiae* and should not be attributed to the organizations or firms with which they are associated.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-63

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

JOSHUA CIVIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street, NW, 10th Fl.
Washington, DC 20005
(202) 682-1300

SAMUEL SPITAL
SQUIRE, SANDERS &
DEMPSEY (US) LLP
30 Rockefeller Plaza,
23rd Fl.
New York, NY 10112

JOHN PAYTON
Director-Counsel
Counsel of Record
DEBO P. ADEGBILE
CHRISTINA SWARNS
JOHNATHAN SMITH
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Fl.
New York, NY 10013
(212) 965-2200
jpayton@naacpldf.org

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
INTERESTS OF AMICUS 1
SUMMARY OF THE ARGUMENT 1
ARGUMENT 3
I. *Giarratano* and *Coleman* establish the framework for this case 3
II. Developments since *Giarratano* and *Coleman* have dramatically altered capital post-conviction practice 6
A. Significant changes in federal habeas procedure have magnified the importance of state post-conviction proceedings 7
B. State post-conviction practice has become far more complex, reinforcing the need for effective counsel 10
C. While almost all states now require appointment of capital post-conviction counsel, this right is severely limited by law and practice 15
D. State interests are now more aggressively asserted in capital cases 20
III. In light of subsequent developments, *Giarratano* and *Coleman* should be reconsidered or at least not extended 22
A. This Court should recognize a constitutional guarantee of competent state

post-conviction counsel in capital cases .. 23

B. Short of reconsidering *Giarratano*, the Court should recognize a right to state post-conviction counsel for claims that could not be pursued in prior litigation .. 26

C. In the alternative, the Court should hold that a federal habeas petitioner has cause to excuse procedural default resulting from state post-conviction counsel's errors that would rise to the level of a constitutional violation if committed at trial or on direct appeal 28

D. Another option would be to find cause to excuse procedural default in a state such as Alabama that fails to provide the minimum constitutional safeguards that *Giarratano* requires..... 30

E. *Coleman* and *Giarratano* should not be extended to preclude federal habeas review for a death-sentenced prisoner abandoned by state post-conviction counsel..... 32

F. Extension of *Coleman* and *Giarratano* is particularly inappropriate where the state is aware of, and takes inadequate steps to address, abandonment by post-conviction counsel 34

CONCLUSION..... 36

Appendix: Survey of State Provision of Counsel for Indigent Death-Sentenced Prisoners in State Post-Conviction Proceedings A-1

TABLE OF AUTHORITIES

Cases

Amadeo v. Zant, 486 U.S. 214 (1988) 35

Ardolino v. People, 69 P.3d 73 (Colo. 2003)..... 27

Atkins v. Virginia, 536 U.S. 304 (2002)..... 25

Banks v. Crosby, No. 4:03-cv-328, 2005 WL 5899837 (N.D. Fla. July 29, 2005) 18

Banks v. Dretke, 540 U.S. 668 (2004)..... 28, 35

Beck v. Alabama, 447 U.S. 625 (1980) 23

Brady v. Maryland, 373 U.S. 83 (1963)..... 27

Brecht v. Abrahamson, 507 U.S. 619 (1993) 8

Brooks v. State, 555 So. 2d 337 (Ala. Crim. App. 1989)..... 11

Brown v. Board of Education, 347 U.S. 483 (1954) 23

Coker v. Georgia, 433 U.S. 584 (1977)..... 1

Coleman v. Thompson, 501 U.S. 722 (1991) .....*passim*

Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002)..... 27

Cone v. Bell, 556 U.S. __, 129 S. Ct. 1769 (2009) 27-28

Crump v. Warden, 934 P.2d 247 (Nev. 1997)..... 18

Cullen v. Pinholster, 563 U.S. __, 131 S. Ct. 1388 (2011) 8

Damren v. McNeil, No. 3:03-cv-397, 2009 WL 129612 (M.D. Fla. Jan. 20, 2009)..... 18

Daniels v. State, 561 N.E.2d 487 (Ind. 1990) 13

District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. __, 129 S. Ct. 2308 (2009) 25

Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) 9

Duncan v. Louisiana, 391 U.S. 145 (1968) 23

Evitts v. Lucey, 469 U.S. 387 (1985) 23, 25-26

Ex parte Foster, No. WR 65,799-02, 2010 WL 5600129 (Tex. Crim. App. Dec. 30, 2010) 17

Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002) 16-17

Ex parte Kerr, No. WR 62,402-03, 2011 WL 1644141 (Tex. Crim. App. Apr. 28, 2011) 17

Furman v. Georgia, 408 U.S. 238 (1972) 1

Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1999) 16

Gideon v. Wainwright, 372 U.S. 335 (1963) 21

Gore v. State, 24 So. 3d 1 (Fla. 2009) 18

Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011 (2010) 1

Halbert v. Michigan, 545 U.S. 605 (2005) 11, 23, 28

Hale v. State, 934 P.2d 1100 (Okla. Crim. App. 1997) 18

Hamilton v. Secretary, DOC, No. 08–14836, 2010 WL 5095880 (11th Cir. Dec. 15, 2010) 18

Harrington v. Richter, 562 U.S. __, 131 S. Ct. 770 (2011) 10, 24

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 30

Holland v. Florida, 560 U.S. __, 130 S. Ct. 2549 (2010) ..... *passim*

House v. Bell, 547 U.S. 518 (2006) 1, 20

House v. State, 911 S.W.2d 705 (Tenn. 1995) 18

Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005) 18

In re Clark, 855 P.2d 729 (Cal. 1993) 13

In re Sanders, 981 P.2d 1038 (Cal. 1999) 19

Jackson v. Weber, 637 N.W.2d 19 (S.D. 2001) 18

Jefferson v. Upton, 560 U.S. __, 130 S. Ct. 2217 (2010) 13-14

Jones v. Flowers, 547 U.S. 220 (2006) 35-36

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 8

Kennedy v. Louisiana, 554 U.S. 407 (2008) 1

Lawrence v. Florida, 549 U.S. 327 (2007) 29

Lozada v. Warden, 613 A.2d 818 (Conn. 1992) 18

Manning v. State, 929 So. 2d 885 (Miss. 2006) 13

Marks v. United States, 430 U.S. 188 (1977) 4

Massaro v. United States, 538 U.S. 500 (2003) 27

McCleskey v. Kemp, 481 U.S. 279 (1987) 1

McCleskey v. Zant, 499 U.S. 467 (1991) 9

McFarland v. Scott, 512 U.S. 849 (1994) 6, 7, 16

Miller v. Maass, 845 P.2d 933 (Or. Ct. App. 1993) 18

Miller-El v. Dretke, 545 U.S. 231 (2005) 1

Missouri v. Holland, 252 U.S. 416 (1920) 23

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 23

Munaf v. Geren, 553 U.S. 674 (2008) 29

Murray v. Carrier, 477 U.S. 478 (1986) 33, 35, 36

Murray v. Giarratano, 492 U.S. 1 (1989) .....*passim*

O'Dell v. Netherland, 521 U.S. 151 (1997) 4

Pennsylvania v. Finley, 481 U.S. 551 (1987) 4, 6, 26

Prowell v. State, 741 N.E.2d 704 (Ind. 2001) 14

Rhines v. Weber, 544 U.S. 269 (2005) 7

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 27

Roper v. Simmons, 543 U.S. 551 (2005) 1, 23, 24, 25

Schlup v. Delo, 513 U.S. 298 (1995) 28, 29, 30

Slack v. McDaniel, 529 U.S. 473 (2000) 10

Smith v. Ohio Department of Rehabilitation & Corrections, 463 F.3d 426 (6th Cir. 2006) 27

State v. Addison, 7 A.3d 1225 (N.H. 2010) 15

State v. Hunt, 634 N.W.2d 475 (Neb. 2001) 18

State v. Mata, 916 P.2d 1035 (Ariz. 1996) 18

State v. Zuniga, 444 S.E.2d 443 (N.C. 1994) 13

State ex rel. Taylor v. Whitley, 606 So. 2d 1292 (La. 1992) 13

State ex rel. Thomas v. Rayes, 153 P.3d 1040 (Ariz. 2007) 27

Strickland v. Washington, 466 U.S. 668 (1984) 18, 29

Strickler v. Greene, 527 U.S. 263 (1999) 35

Teague v. Lane, 489 U.S. 288 (1989) 13

Thomas v. State, 888 P.2d 522 (Okla. Crim. App. 1994) 13

Trop v. Dulles, 356 U.S. 86 (1958) 24

Waters v. State, 574 N.E.2d 911 (Ind. 2004) 19

Williams v. Taylor, 529 U.S. 362 (2000) 8

Woodford v. Visciotti, 537 U.S. 19 (2002) 8

Woodson v. North Carolina, 428 U.S. 280 (1976) 24

Federal Statutes and Congressional Materials

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 7

18 U.S.C. § 3599 22

28 U.S.C. § 2244(b) 9

28 U.S.C. § 2244(d)(1) 8-9, 18

28 U.S.C. § 2244(d)(2) 9

28 U.S.C. § 2254(b)(1) 15

28 U.S.C. § 2254(d) 8

28 U.S.C. § 2254(e)(2) 8

28 U.S.C. § 2254(i) 26

141 Cong. Rec. 15,016 (1995) 10

State Statutes

Ala. Code § 15-12-23(d) 19
Ariz. Rev. Stat. Ann. § 13-4041(F) 19
Ariz. Rev. Stat. Ann. § 13-4041(G) 19
Colo. Rev. Stat. §§ 16-12-201 *et seq.* 13
Colo. Rev. Stat. § 16-12-205(5) 18
Fla. Stat. § 27.711(4) 19
Mont. Code Ann. § 46-21-105(2) 18
N.C. Gen. Stat. § 15A-1415(a) 12
N.C. Gen. Stat. § 15A-1419(c) 18
Ohio Rev. Code Ann. § 2953.21(A)(2) 13
Ohio Rev. Code Ann. § 2953.21(I)(2) 18
Ohio Rev. Code. Ann. § 2953.23 13
Okla. Stat. tit. 22, § 1089(D)(1) 13
S.C. Code Ann. § 16-3-26(B)(2) 19
S.C. Code Ann. § 17-27-160(B) 19
Tenn. Code Ann. § 40-30-102(c) 13
Tenn. Code Ann. § 40-30-106(d) 11
Tenn. Post-Conviction Procedure Act, 1995 Tenn. Pub. Acts ch. 207 11
Tex. Code Crim. Proc. Ann. art. 11.071 § 2(a) 16
Tex. Code Crim. Proc. Ann. art. 11.071 § 2(b) 21
Tex. Code Crim. Proc. Ann. art. 11.071 § 2A(a) 19
Tex. Code Crim. Proc. Ann. art. 11.071 § 4 13
Tex. Code Crim. Proc. Ann. art. 11.071 § 5 13

Va. Code Ann. § 8.01-654.1 12

Va. Code Ann. § 19.2-163.7 12

Va. Code Ann. § 19.2-163.8(D) 18

State Rules and Policies

Ala. R. Crim. P. 32.6(b) 11

Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, 797 So. 2d 1213 (Fla. 2001) 12

California Supreme Court, *Supreme Court Policies Regarding Cases Arising From Judgments of Death*, § 2-2.1, *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02f.pdf 19

Fla. R. Crim. P. 3.851(e)(1) 11-12

Miss. R. App. P. 22(c)(5)(i) 12

Miss. R. App. P. 22(c)(6) 12

Other Authorities

American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf 32

American Bar Association, *Evaluating Fairness and Accuracy in State Death*

Penalty Systems: The Georgia Death Penalty Assessment Report (Jan. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf 16

American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report* (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.authcheckdam.pdf 14

Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/ grants/228091.pdf..... 20

Equal Justice Initiative, *The Death Penalty in Alabama* (Jan. 2011), *available at* http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf 31

Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 20

James C. Ho, *Defending Texas: The Office of the Solicitor General*, 29 Rev. Litig. 471 (2010) 21

Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 Am. J.

Crim. L. 207 (2007)..... 13-14, 17

James R. Layton, *The Evolving Role of the State Solicitor General: Toward the Federal Model?*, 3 J. App. Prac. & Process 533 (2001) 21

Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons From Florida*, 34 Am. J. Crim. L. 277 (2007)..... 21

Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, Nat'l L.J., Aug. 18, 2008 21

Petition for Writ of Certiorari, *Barbour v. Allen*, 551 U.S. 1134 (2007) (No. 06-10605)..... 13

Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), *available at* http://www.texasdefender.org/publications#..... 17

INTERESTS OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than seven decades. LDF has a long-standing concern with the fair and unbiased administration of the criminal justice system in general, and the death penalty in particular. For this reason, LDF has served as counsel in cases before this Court including, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *Coker v. Georgia*, 433 U.S. 584 (1977), *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Banks v. Dretke*, 540 U.S. 668 (2004), and *House v. Bell*, 547 U.S. 518 (2006), and it has appeared as amicus curiae in, *inter alia*, *Roper v. Simmons*, 543 U.S. 551 (2005), *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and *Graham v. Florida*, 560 U.S. __, 130 S. Ct. 2011 (2010).

SUMMARY OF THE ARGUMENT

Through no fault of his own, Cory Maples faces execution by the state of Alabama without any merits review of serious constitutional challenges to his conviction and sentence. His trial lawyers admitted to "stumbling around in the dark" due to their inexperience litigating capital cases. Pet. Br. 8-9. Then, his state post-conviction counsel aban-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

doned him while proceedings were pending. When the state court clerk's office learned this, it did nothing to alert Maples before a critical filing deadline expired.

It is well settled that federal habeas courts have equitable authority to excuse a state-court procedural default such as a missed filing deadline. Nonetheless, a divided panel of the Eleventh Circuit held that there was insufficient "cause" to do so here, notwithstanding the incomprehensible failings of Maples's attorneys and the court clerk's office. As a result, federal habeas review was entirely foreclosed.

That decision cannot stand. An appropriate remedy must account for the developments that have dramatically altered the legal landscape over the past twenty years. In *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court declined to provide constitutional or equitable safeguards against incompetent state post-conviction counsel in capital cases. Since 1991, however, numerous procedural obstacles have been erected throughout the post-conviction process. This increasing "complexity . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of a person learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). Although most death-penalty states (with the notable exception of Alabama) have recognized these perils and now guarantee capital post-conviction counsel as a matter of state law, this right is frequently under-enforced, and the performance of appointed counsel is often woefully inadequate.

In light of these developments, it would be unwarranted for this Court to extend *Giarratano* and *Coleman* to the distinctive circumstances at issue here. Maples — sentenced to death in one of the few states that provides no right to capital post-conviction counsel — was entirely blameless for a state-court procedural default caused by attorney abandonment and state misconduct. Accordingly, amicus agrees with Petitioner that the Eleventh Circuit's refusal to find cause to excuse the procedural default in this case should be reversed.

In addition, this case offers the Court an occasion to take account of the dangerous fissures that have opened in the post-conviction landscape in the past two decades and to provide additional safeguards to ensure that death-sentenced prisoners in Alabama and elsewhere are not unfairly penalized for attorney misconduct that would rise to the level of a constitutional violation if committed during trial or on direct appeal. To this end, amicus sets out a graduated series of protections that this Court could adopt — either as a matter of constitutional right or through the equitable principles underlying the Great Writ of Habeas Corpus.

ARGUMENT

I. *Giarratano* and *Coleman* establish the framework for this case.

The legal foundations for this case trace back to this Court's decisions in *Giarratano* and *Coleman*.

Decided in 1989, *Giarratano* held that Virginia death-row prisoners were not constitutionally entitled to increased legal assistance in state post-conviction proceedings. 492 U.S. at 3-4. On behalf

of a four-justice plurality, then-Chief Justice Rehnquist built upon the Court's prior holding that, as a general matter, there is "no underlying constitutional right to appointed counsel in state postconviction proceedings." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). That proposition is settled, and amicus does not contest it here.

Rather, amicus takes issue with the *Giarratano* plurality's reasoning that this proposition "should apply no differently in capital cases than in noncapital cases." 492 U.S. at 10. The Court's 5-4 decision did not turn on that categorical pronouncement. Justice Kennedy's separate concurrence provides a more nuanced, fact-sensitive view of the constitutional protections for death-sentenced prisoners. *Id.* at 14-15 (Kennedy, J., concurring in the judgment). Because Justice Kennedy's concurrence is narrower than the plurality's reasoning, it is controlling. *See O'Dell v. Netherland*, 521 U.S. 151, 162 (1997); *Marks v. United States*, 430 U.S. 188, 193 (1977).

Declining to rely on *Finley* or to import its rationale into the capital context, Justice Kennedy agreed with the four dissenters that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death" because "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). Moreover, he recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.*

Nevertheless, Justice Kennedy determined that the constitutional "requirement of meaningful access can be satisfied in various ways." *Id.* While he recognized that "Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States," Justice Kennedy concluded that, "[o]n the facts and record *of this case*," Virginia had met its constitutional duty. *Id.* at 14-15 (emphasis added).

Two years later in *Coleman*, the Court applied *Giarratano* in the federal habeas context. A death-sentenced prisoner, also from Virginia, argued that the negligence of his state post-conviction counsel should provide cause to excuse the procedural default that occurred due to his failure to timely appeal the state post-conviction trial court's denial of his claims. *Coleman*, 501 U.S. at 752-54. The Court rejected this argument. Because *Giarratano* held that there is no constitutional right to post-conviction counsel for Virginia death-row prisoners, the Court concluded that "any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

Nothing in *Coleman* suggested any change in the facts, which were critical to Justice Kennedy's pivotal concurrence in *Giarratano*, concerning post-conviction capital representation in Virginia. Thus, it was unremarkable that *Coleman* did not reference Justice Kennedy's controlling view in *Giarratano* that the facts concerning access to the courts are determinative of the post-conviction right to counsel for death-sentenced persons.

Coleman did suggest that a serious access-to-courts problem may arise where post-conviction counsel's ineffectiveness prevented review of claims that could only be fully and fairly litigated for the first time in post-conviction proceedings. 501 U.S. at 755-56. But *Coleman* declined to decide whether there is "an exception to the rule of *Finley* and *Giarratano*" in such circumstances. *Id.* at 755. That broad question was left unresolved because Coleman did not challenge the effectiveness of his representation at the trial-court stage of post-conviction review. *Id.* at 755-57.

While this Court has subsequently cited *Coleman* and *Giarratano*, *see, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994), it has not directly revisited the scope of those two cases, despite profound changes in capital post-conviction litigation processes over the past twenty years.

II. Developments since *Giarratano* and *Coleman* have dramatically altered capital post-conviction practice.

Giarratano and *Coleman* were grounded in the legal landscape of their time. While Justice Kennedy's *Giarratano* concurrence encouraged Congress and the states to experiment with "responsible solutions" to the problem of meaningful access to state post-conviction proceedings, 492 U.S. at 14 (Kennedy, J., concurring in the judgment), they have done just the opposite. Over the past two decades, federal legislation has imposed additional barriers to federal review of state capital convictions; many of these bars are triggered by defaults in preceding state-court litigation. As a result, state post-

conviction litigation has become the primary forum for the vindication of federal constitutional rights, including the adjudication of claims of innocence. Simultaneously, state post-conviction procedures have become more complex, convoluted, and fast paced.

Furthermore, while almost all death-penalty states now provide post-conviction counsel in capital cases as a matter of state law, most have been unwilling to enforce any guarantee of minimally effective representation. Thus, the representation provided to death-sentenced prisoners in state post-conviction proceedings is all-too-often woefully inadequate.

A. Significant changes in federal habeas procedure have magnified the importance of state post-conviction proceedings.

In the twenty years since *Giarratano* and *Coleman*, substantive revisions to federal habeas procedure have made state post-conviction proceedings the primary forum for the presentation and adjudication of federal constitutional claims. In particular, the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, "dramatically altered the landscape for federal habeas corpus petitions." *Rhines v. Weber*, 544 U.S. 269, 274 (2005).[2]

---

[2] Pre-AEDPA, this Court's "death penalty jurisprudence unquestionably [was] difficult even for a trained lawyer to master." *McFarland*, 512 U.S. at 856 (citation and quotation marks omitted). But many pre-AEDPA obstacles emerged in decisions

First, AEDPA imposed a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks omitted). Federal courts may grant habeas relief only when a state-court "merits" determination "was contrary to" or "involved an unreasonable application of" this Court's precedents, or when the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Even state-court decisions that "applied clearly established federal law erroneously or incorrectly" are irremediable unless the error is "also . . . unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Second, AEDPA made it even more critical for petitioners to develop the factual basis for all known claims in state court. Not only is federal habeas review of certain claims "limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 563 U.S. __, 131 S. Ct. 1388, 1398 (2011), but AEDPA also imposes a restrictive standard for evidentiary hearings in federal habeas proceedings, 28 U.S.C. § 2254(e)(2). As a result, "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Cullen*, 131 S. Ct. at 1401.

Third, AEDPA's imposition of a one-year filing deadline for federal habeas petitions has exacerbated the plight of indigent death-row prisoners. *See* 28

---

that post-dated *Giarratano*. *See, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

U.S.C. § 2244(d)(1). Although this statute of limitations is tolled while state post-conviction proceedings are pending, it runs throughout the time that the state post-conviction petition is prepared for filing, and it starts running again immediately upon entry of a final state-court judgment. *See id.* § 2244(d)(2). These time limitations make it even more critical for death-sentenced prisoners to have assistance from qualified counsel who can efficiently and effectively research, investigate, and draft a state post-conviction pleading. Otherwise, the petitioner will be in danger of defaulting claims under state pleading requirements or of filing the state pleading so late in AEDPA's one-year limitation period that the time remaining to prepare a federal habeas petition after a final state-court judgment is inadequate. *See, e.g.*, *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (post-conviction attorneys "waited until the eleventh hour to file [their client's] state habeas petition," thereby leaving only one business day to file a federal habeas petition).[3]

Finally, AEDPA generally prohibits the successive litigation of federal habeas petitions. 28 U.S.C. § 2244(b). These restrictions are far more stringent than those applied pre-AEDPA or, indeed, at the time that *Giarratano* and *Coleman* were decided. *See McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991). Thus, except in extremely limited circumstances, a death-sentenced prisoner now has only one opportunity to seek federal habeas review.

---

[3] Even shorter post-conviction deadlines in many states increase the time pressure to adequately investigate and plead all constitutional claims. *See infra* at 12-13 & nn.5, 6.

The changes outlined above fundamentally altered the relationship between state and federal post-conviction proceedings. Post-AEDPA, a condemned prisoner's ability to properly present a federal claim in a state post-conviction forum is literally a matter of life and death. Federal habeas review is far more limited and no longer serves as the cure-all for mistakes of law and fact which occur in state post-conviction proceedings, as it did when *Giarratano* was decided. Instead, "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding," *Harrington v. Richter*, 562 U.S. __, 131 S. Ct. 770, 787 (2011), and state courts' pronouncements on questions of guilt and punishment routinely become authoritative.

Nevertheless, this Court recently explained that "[w]hen Congress [in AEDPA] codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland v. Florida*, 560 U.S. __, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Indeed, Congress considered and rejected proposals that would have effectively eliminated federal habeas review for any claim that had been litigated in state court. *See, e.g.*, 141 Cong. Rec. 15,016, 15,044-45, 15,066 (1995).

B. State post-conviction practice has become far more complex, reinforcing the need for effective counsel.

The two decades since *Giarratano* and *Coleman* have also seen sweeping changes in state post-conviction rules. Many states have imposed rigid

deadlines and procedural restrictions on access to their own post-conviction forums. As a result, state post-conviction procedure, like the appellate review process at issue in *Halbert v. Michigan*, is an increasingly "perilous endeavor for a layperson" to navigate without the benefit of counsel, and it goes "well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments" — a profile all too common among death-row prisoners. 545 U.S. 605, 621 (2005).

Since *Giarratano*, many death-penalty states have tightened pleading requirements and other rules governing presentation of federal claims in state post-conviction proceedings. For instance, legislative changes, adopted by Tennessee in 1995, require petitioners seeking post-conviction relief to plead "a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Post-Conviction Procedure Act, 1995 Tenn. Pub. Acts ch. 207, § 1 (codified at Tenn. Code Ann. § 40-30-106(d)). Tennessee also provides that "bare allegation[s] that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further [post-conviction] proceedings." *Id.*[4]

Similarly, as a result of post-*Giarratano* revisions to Florida rules, petitioners must now meet specific pleading requirements, including, *inter alia*, "de-

---

[4] Not all such changes have occurred since *Giarratano*. This Tennessee provision is almost identical to a long-standing pleading requirement imposed by neighboring Alabama. *See* Ala. R. Crim. P. 32.6(b); *Brooks v. State*, 555 So. 2d 337, 337 (Ala. Crim. App. 1989).

tailed allegation[s] of the factual basis for any claim for which an evidentiary hearing is sought," and of "any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal." Fla. R. Crim. P. 3.851(e)(1); *Amendments to Fla. Rules of Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213, 1218-19, 1228-29 (Fla. 2001). Such heightened pleading standards increase the necessity of developing specific factual support for every claim at the initial stage of state post-conviction proceedings, thereby creating a threshold obstacle that is particularly difficult for a death-sentenced individual to surmount while confined in prison without competent counsel.

Further, many death-penalty states have adopted stringent post-conviction filing deadlines.[5] Others have created "unitary" systems, in which death-sentenced prisoners must prepare for both direct appeal and state post-conviction proceedings simulta-

---

[5] For instance, Mississippi rule amendments, adopted in 1996, provide that a capital post-conviction petition generally must be filed within 30 days following the Mississippi Supreme Court's grant of permission to file, and such permission must be requested no later than 180 days after post-conviction counsel is appointed or 60 days following denial of rehearing on direct appeal, whichever is later. Miss. R. App. P. 22(c)(5)(i), (6); *see also, e.g.*, N.C. Gen. Stat. § 15A-1415(a) (120-day deadline for most post-conviction capital petitions, adopted in 1996); Va. Code Ann. §§ 8.01-654.1, 19.2-163.7 (120-day deadline, adopted in 1998, from the appointment of post-conviction capital counsel, which must occur within 30 days of the Virginia Supreme Court's decision affirming a death sentence; otherwise a 60-day deadline, adopted in 1995, applies).

neously, shortly after the conclusion of trial.[6]

Also as a result of changes over the past twenty years, most death-penalty states now preclude the filing of successive state post-conviction petitions, except in very limited circumstances.[7] Additionally, many states have narrowed the scope of relief available in post-conviction proceedings by adopting non-retroactivity rules modeled on those announced by this Court in *Teague v. Lane*, 489 U.S. 288 (1989).[8]

Finally, in Alabama and elsewhere, it has become prevailing practice for state courts to dismiss capital post-conviction petitions by adopting verbatim orders drafted by state prosecutors, without any judicial review of the content of those orders. *See* Petition for Writ of Certiorari, *Barbour v. Allen*, 551 U.S. 1134 (2007) (No. 06-10605), at 17-18.[9] In a recent

---

[6] Since *Giarratano*, unitary systems have been adopted in states such as Colorado, Ohio, Oklahoma, and Texas. *See* Colo. Rev. Stat. §§ 16-12-201 *et seq.* (adopted in 1997); Ohio Rev. Code Ann. § 2953.21(A)(2) (adopted in 1995); Okla. Stat. tit. 22, § 1089(D)(1) (adopted in 1995); Tex. Code Crim. Proc. Ann. art 11.071 § 4 (adopted in 1995).

[7] For instance, Ohio, Tennessee, and Texas adopted restrictions on successive petitions in 1995. *See* Ohio Rev. Code. Ann. § 2953.23; Tenn. Code Ann. § 40-30-102(c); Tex. Code Crim. Proc. Ann. art. 11.071 § 5; *see also, e.g.*, *In re Clark*, 855 P.2d 729, 740-45 (Cal. 1993).

[8] *See, e.g.*, *Manning v. State*, 929 So. 2d 885, 900 (Miss. 2006); *State v. Zuniga*, 444 S.E.2d 443, 446 (N.C. 1994); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994); *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296-97 (La. 1992); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990).

[9] *See also* Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 Am. J. Crim. L. 207, 225 (2007) (hereinafter Keilen & Levin,

capital case, the Court "criticized that practice." *Jefferson v. Upton*, 560 U.S. __, 130 S. Ct. 2217, 2223 (2010) (per curiam). The need for adequate legal representation is magnified where state judges fail to play an independent role in protecting petitioners' rights and, instead, simply countersign orders that contain unsupported factual findings, nonexistent procedural defaults, and tenuous legal conclusions drafted by state prosecutors seeking to invoke every possible legal ground for rejecting the petitioners' claims and insulating the case from federal habeas review.

By tightening deadlines and adopting AEDPA-like procedural restrictions, states have substantially complicated the maze of complex rules that death-sentenced prisoners must navigate during state post-conviction proceedings. The most immediate effect of these changes is to limit condemned individuals' right of meaningful access to a state post-conviction forum to litigate constitutional challenges to their convictions and sentences. There is,

---

Moving Forward) (finding that, in 90% of Texas capital post-conviction proceedings between 1995 and 2006, the trial court's findings were virtually identical to those submitted by state prosecutors); *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001) (observing that "[i]t is not uncommon" for Indiana courts "to enter findings that are verbatim reproductions of submissions by the prevailing party"); Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report* 264-65 (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.authcheckdam.pdf (surveying Ohio post-conviction courts' practice of "wholesale adoption of the State's proposed finds of fact and conclusions of law").

however, a still more drastic secondary effect. Because the exhaustion of state remedies is generally a precondition for federal habeas review, 28 U.S.C. § 2254(b)(1), states' purported post-conviction "remedies" ensnare prisoners in procedural defaults that bar their claims in federal court.

C. While almost all states now require appointment of capital post-conviction counsel, this right is severely limited by law and practice.

Over the past twenty years, states have increasingly recognized that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death" and therefore "the assistance of persons learned in the law" is necessary to navigate the "complexity" of these proceedings. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). When *Giarratano* was decided, eighteen of the thirty-seven death-penalty states guaranteed appointment of state post-conviction counsel for indigent death-sentenced individuals. *Id.* at 10 n.5 (plurality opinion); *id.* at 30 & n.26 (Stevens, J., dissenting). Today, by contrast, almost all of the thirty-four states that permit imposition of the death penalty provide such a right to counsel — and Alabama is a distinct outlier among the few that do not.[10]

---

[10] The appendix to this brief compiles the rules for appointment of capital post-conviction counsel in death-penalty states. Thirty-one states provide a right to counsel. Of the three remaining states, New Hampshire has sentenced only one individual to death since it revised its death-penalty statute in 1977, and his conviction and sentence are still pending on direct review. *See State v. Addison*, 7 A.3d 1225, 1256 (N.H. 2010). While Georgia does not guarantee capital post-

Notwithstanding this positive trend, most states severely limit the substance of the right to post-conviction counsel by law or in practice. For instance, in eleven death-penalty states, the appointment of post-conviction counsel occurs only after a post-conviction petition is timely filed *pro se*. *See* Appendix. Even if appointed counsel is permitted to amend the petition, requiring *pro se* initiation of post-conviction procedures can have a substantial chilling effect. *Cf. McFarland*, 512 U.S. at 856 ("Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel . . . would expose him to the substantial risk that his habeas claims never would be heard on the merits.").

Moreover, a paper guarantee of post-conviction counsel does not ensure quality, or even minimally adequate, representation, especially in light of the technical complexity of capital post-conviction review. In Texas, for instance, "competent" counsel is required by statute in capital post-conviction proceedings. Tex. Code Crim. Proc. Ann. art. 11.071 § 2(a). The Texas Court of Criminal Appeals, however, has interpreted this competency requirement as measuring only counsel's "qualifications, experience, and abilities at the time of his appointment," regardless of performance. *Ex parte Graves*, 70

---

conviction counsel, it provides some funding to the Georgia Appellate and Educational Resource Center, which represents some death-sentenced individuals in state habeas appeals. *See Gibson v. Turpin*, 513 S.E.2d 186, 187-88, 191 (Ga. 1999); Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* 196-97 & n.113 (Jan. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf.

S.W.3d 103, 113-14 (Tex. Crim. App. 2002). Accordingly, the Court of Criminal Appeals has refused to permit a claim of ineffective assistance of post-conviction counsel to be heard in a successive petition. *Id.* at 117-18.[11] The inadequacies of Texas's approach are evident in multiple stories of appointed post-conviction counsel who failed to raise any cognizable or extra-record claims, cut and pasted their client's letters into their pleadings instead of writing a legal claim for relief, used boilerplate pleadings that failed to change the client name or the facts of the crime, never visited their client, and failed to conduct any investigation whatsoever.[12]

Like Texas, at least ten other death-penalty states that guarantee a right to post-conviction capital counsel refuse to provide any relief when attorneys provide ineffective assistance, at least so long as those attorneys met state qualification standards

---

[11] *Ex parte Graves* has been called into question by the petitioner's subsequent exoneration, as well as documented examples of extraordinary incompetence by appointed post-conviction counsel in other Texas cases. *See Ex parte Kerr*, No. WR 62,402-03, 2011 WL 1644141 (Tex. Crim. App. Apr. 28, 2011) (Price, J., dissenting); *Ex parte Foster*, No. WR 65,799-02, 2010 WL 5600129, at *2 (Tex. Crim. App. Dec. 30, 2010) (Price, J., dissenting).

[12] *See* Keilen & Levin, *Moving Forward*, at 225-32, 239-43, 248-49. Of state post-conviction petitions filed in Texas capital cases between 1995 and 2006, 12% were less than fifteen pages, 27% contained no extra-record claims, and 38% did not attach any extra record materials. *Id.* at 225; *see also generally* Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), *available at* http://www.texasdefender.org/publications#.

at the time of their appointment.[13] Among these states is Florida, where there are numerous recent examples of attorneys appointed to represent death-sentenced prisoners in state post-conviction proceedings who failed to file a federal habeas petition within AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(1). In some instances, this was because of their failure to file a timely state petition, in others because counsel was ignorant of the applicable federal laws.[14]

Even among death-penalty states that do provide some remedy for ineffective assistance of capital post-conviction counsel, only a few have adopted the standard set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), for determining whether an attorney is minimally competent.[15] Elsewhere, relief appears limited to circumstances where post-conviction counsel effectively abandoned

---

[13] *See, e.g., Gore v. State*, 24 So. 3d 1, 16 (Fla. 2009); *State v. Hunt*, 634 N.W.2d 475, 479-80 (Neb. 2001); *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *House v. State*, 911 S.W.2d 705, 712-13 (Tenn. 1995); *Miller v. Maass*, 845 P.2d 933, 934 (Or. Ct. App. 1993); Colo. Rev. Stat. § 16-12-205(5); Mont. Code Ann. § 46-21-105(2); N.C. Gen. Stat. § 15A-1419(c); Ohio Rev. Code Ann. § 2953.21(I)(2); Va. Code Ann. § 19.2-163.8(D).

[14] *See, e.g., Hamilton v. Secretary, DOC*, No. 08-14836, 2010 WL 5095880, at *1-2 (11th Cir. Dec. 15, 2010); *Howell v. Crosby*, 415 F.3d 1250, 1251 (11th Cir. 2005); *Damren v. McNeil*, No. 3:03-cv-397, 2009 WL 129612, at *1-2 (M.D. Fla. Jan. 20, 2009); *Banks v. Crosby*, No. 4:03-cv-328, 2005 WL 5899837, at *3 (N.D. Fla. July 29, 2005).

[15] *See, e.g., Jackson v. Weber*, 637 N.W.2d 19, 22-24 (S.D. 2001); *Crump v. Warden*, 934 P.2d 247, 303-04 (Nev. 1997); *Hale v. State*, 934 P.2d 1100, 1102-03 (Okla. Crim. App. 1997); *Lozada v. Warden*, 613 A.2d 818, 842-43 (Conn. 1992).

a death-sentenced prisoner.[16]

In addition, many death-penalty states constrain counsel in state post-conviction proceedings by limiting compensation for legal work, as well as investigative and expert assistance. For instance, in the rare circumstances where Alabama courts appoint state post-conviction counsel, there is an extremely low fee cap of $1,000. Ala. Code § 15-12-23(d).[17] Lawyers subjected to such a fee cap are prone to do no more than re-argue the claims raised on direct review or in their client's initial *pro se* post-conviction pleading. Counsel lack the resources or incentive to develop additional claims, however meritorious.

---

[16] *See, e.g.*, *Waters v. State*, 574 N.E.2d 911, 911-12 (Ind. 2004) (refusing to follow *Strickland* but allowing a death-sentenced prisoner "to begin anew his quest for post-conviction relief" where "[c]ounsel, in essence, abandoned [him]"); *In re Sanders*, 981 P.2d 1038, 1041 n.1, 1055 (Cal. 1999) (holding that "abandonment" by post-conviction capital counsel "is a relevant factor in determining whether a petition has shown good cause to justify a delay in presentation of claims").

[17] *See also, e.g.*, Ariz. Rev. Stat. Ann. § 13-4041(F), (G) (capping attorneys' fees at $100 per hour for up to 200 hours, but allowing additional compensation for "good cause"); Fla. Stat. § 27.711(4) (capping investigative expenses at $15,000 absent "extraordinary circumstances" and attorneys' fees at $84,000); S.C. Code Ann. §§ 16-3-26(B)(2), 17-27-160(B) (capping attorneys' fees at $25,000); Tex. Code Crim. Proc. Ann. art. 11.071 § 2A(a) (capping state reimbursement for attorneys' fees and expenses at $25,000, but providing counties with discretion to exceed this cap); Cal. Sup. Ct., *Sup. Ct. Policies Regarding Cases Arising From Judgments of Death*, § 2-2.1, *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02f.pdf (capping investigation expenses at $25,000 in some cases and $50,000 in others).

The combination of funding limitations and the consequent reluctance of qualified lawyers to accept appointment are particularly worrisome because exculpatory evidence tends to emerge at a relatively late stage in capital cases and often is revealed only by advances in DNA technology and growing concerns over the reliability of other forensic techniques. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 540-54 (2006); Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 40-44 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

Thus, even more so than at the time *Giarratano* was decided, courts (and the general public) have come to appreciate that post-conviction proceedings provide the primary forum for exposing the constitutional violations that all too often pervade the investigation, prosecution, conviction, and sentencing of capital defendants. *Cf.* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 531-33 (2005) (finding that erroneous convictions occur disproportionately in capital cases due to special circumstances that affect the investigation and prosecution of those cases).

D. State interests are now more aggressively asserted in capital cases.

States have increasingly recognized that attorneys who are experienced in all aspects of state and federal post-conviction work will achieve better results than less experienced lawyers. While some death-penalty states fund specialized defender of-

fices specifically to handle post-conviction proceedings,[18] almost all states have specialized capital habeas teams to defend their interests in state and federal post-conviction proceedings. *See* Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons From Florida*, 34 Am. J. Crim. L. 277, 283 (2007); *cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

In addition, there has been a substantial increase in the appointment of state solicitors general to supervise appellate litigation on behalf of their state. Currently, at least thirty-seven states have solicitors general or someone with similar responsibilities — up from approximately eight at the time *Giarratano* was decided. *See* Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, Nat'l L.J., Aug. 18, 2008, at 1; James R. Layton, *The Evolving Role of the State Solicitor General: Toward the Federal Model?*, 3 J. App. Prac. & Process 533, 534 (2001). In many states, a key function of the solicitor general is to oversee capital appellate proceedings, especially before this Court. *See, e.g.*, James C. Ho, *Defending Texas: The Office of the Solicitor General*, 29 Rev. Litig. 471, 473-74, 487-93 (2010).

---

[18] Texas did so most recently, establishing the state-funded Office of Capital Writs to represent in state post-conviction proceedings all prisoners sentenced to death after September 1, 2009. *See* Tex. Code Crim. Proc. Ann. art. 11.071 § 2(b).

Thus, what was already an unlevel playing field has become even more tilted, increasing the importance of effective state post-conviction counsel in capital cases.[19]

III. In light of subsequent developments, *Giarratano* and *Coleman* should be reconsidered or at least not extended.

The developments of the past twenty years render the assumptions underlying *Giarratano* and *Coleman* worthy of reconsideration. At a minimum, these developments make it inappropriate to extend *Giarratano* and *Coleman* to the factual circumstances of Maples's case. Below, amicus sets out a graduated series of protections that this Court could adopt — either as a matter of constitutional right or through the equitable principles underlying federal habeas review — to ensure that Maples and other death-sentenced individuals are not unfairly penalized for attorney conduct in post-conviction proceedings that would call for constitutional relief if committed by trial or direct appeal counsel.

---

[19] While federal law requires appointment of counsel for indigent capital offenders in federal habeas proceedings, 18 U.S.C. § 3599, representation at that stage is insufficient by itself, given that developments since *Giarratano* and *Coleman* have magnified the importance of state post-conviction proceedings for the adjudication of federal claims, *see* Section II.B *supra*, and substantive federal habeas review is generally dependent upon adequate presentation of those claims to the state court, *see* Section II.A *supra*.

A. This Court should recognize a constitutional guarantee of competent state post-conviction counsel in capital cases.

In *Giarratano*, it was undisputed that the Constitution mandates "meaningful access" to state post-conviction procedures which allow for litigation of constitutional challenges to capital convictions and sentences. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). The only outstanding question was the scope of that mandate.

The meaningful-access right recognized in *Giarratano* is rooted in the requirements of the Sixth Amendment right to counsel as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Halbert*, 545 U.S. at 610; *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996); *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1985). Additionally, the Eighth Amendment's demand of heightened reliability in capital cases implies the need for special attention to procedural protections when the death penalty is involved. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). These constitutional safeguards evolve as times and conditions change.[20] And so much has changed since *Giarratano* was decided that it is now time for this Court to recognize a constitutional right to competent state post-conviction counsel in capital cases.

---

[20] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (Eighth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 149-50 & n.14 (1968) (Sixth and Fourteenth Amendments); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (Fourteenth Amendment); *cf. Missouri v. Holland*, 252 U.S. 416, 433-34 (1920) (treaty power).

As detailed in Section II.A *supra*, state post-conviction proceedings often serve as the only forum for developing and adjudicating the facts necessary to establish federal constitutional claims, including claims of actual innocence, and are the "principal forum" for legal consideration of such claims. *See Harrington*, 131 S. Ct. at 787. At the same time, state post-conviction procedures have become increasingly governed by complex and time-sensitive rules, which are aggressively invoked by expert state prosecutors to foreclose further consideration of claims, including through submission of draft orders that state judges often adopt verbatim. *See* Section II.B *supra*. These developments have combined to greatly increase the perils facing death-sentenced individuals who are forced to initiate the state post-conviction process without assistance of counsel.

Putting aside Alabama and a few other states, a national consensus has recognized these perils and responded to them by providing counsel for indigent condemned prisoners at the critical stage of investigating, researching, drafting, and filing state post-conviction pleadings. *See* Section II.C *supra*. This Court has regarded such emergent consensus as a key indicator of "'the evolving standards of decency that mark the progress of a maturing society'" for Eighth Amendment purposes. *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).[21]

---

[21] Evolving standards regarding appropriate *procedures* call for constitutional recognition no less than evolving substantive norms. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 289-94, 301 (1976) (lead opinion). Here, the evolution since *Giarratano* is at least as dramatic — in its volume, rapidity, and

Yet, without a federal constitutional guarantee of minimally effective counsel in state post-conviction proceedings, the actual performance of appointed attorneys for death-row prisoners in most states will likely remain "fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. __, 129 S. Ct. 2308, 2320 (2009). The absence of any system for the appointment of state post-conviction lawyers in Alabama and a few other jurisdictions, and the inadequacies and underfunding of appointed counsel in many other death-penalty states, mean that the necessary preparation for timely filing adequate state and federal post-conviction petitions is simply not done. As a result, it is virtually certain in places like Alabama, and not at all unlikely in other states, that valid claims of federal constitutional error will go unidentified, undeveloped, or unpresented. In other cases, *all* post-conviction review is forfeited as a result of missed state or federal deadlines. *See* Section II.C *supra*.

Accordingly, this Court should reexamine *Giarratano* in light of the significant developments that have occurred in the intervening years and recognize that death-sentenced prisoners cannot fairly litigate constitutional claims raised in state post-conviction proceedings without a federal constitutional guarantee of minimally competent counsel. *Cf. Evitts*, 469 U.S. at 396 ("[A] party whose counsel is unable to

---

consistent direction of change — as it was in recent Eighth Amendment cases where this Court has found a national consensus. *Compare Roper*, 543 U.S. at 564-65, *and Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002), *with* Section II.C *supra*.

provide effective representation is in no better position than one who has no counsel at all.").[22]

B. Short of reconsidering *Giarratano*, the Court should recognize a right to state post-conviction counsel for claims that could not be pursued in prior litigation.

As discussed in Section I *supra*, *Coleman* left open the question of whether there is "an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. Short of overruling *Giarratano*, this Court should recognize the exception sought by the petitioner in *Coleman* and hold that death-sentenced prisoners have a constitutional right to competent counsel to litigate claims that can be fully and fairly litigated for the first time only in state post-conviction proceedings (practically or as a matter of state law).[23]

---

[22] As applied in this case, neither this remedial option nor any other discussed below would implicate 28 U.S.C. § 2254(i). Maples has not alleged that the ineffectiveness of his post-conviction counsel is a "ground" for federal habeas relief in this case. *Id.*; Pet. Br. 13-14. Rather, he has alleged that the misconduct of post-conviction counsel (among other things) is "cause" to excuse the procedural default and *reach* the merits of his underlying grounds for relief.

[23] Amicus further submits that *Coleman* should be reconsidered to the extent it suggests that any such constitutional right extends only to the initial, or trial, stage of post-conviction proceedings and not to subsequent appeals. *See Coleman*, 501 U.S. at 755-56. But reconsideration is unnecessary in this case because effective assistance at the trial stage of post-conviction proceedings should unquestionably require counsel to notify their client of the outcome of that proceeding.

Among those claims are alleged ineffective assistance of trial and direct appeal counsel. As this Court has recognized, post-conviction proceedings are "preferable to direct appeal for deciding claims of ineffective-assistance" because such claims typically require investigation and development of a factual predicate beyond that which is contained in the trial record. *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). It is for this reason that "[a] growing majority of states" require or encourage defendants to raise claims of trial and appellate counsel ineffectiveness in state post-conviction proceedings. *Id.* at 508.[24]

In addition, state post-conviction proceedings are often the first forum for judicial review of constitutional claims based on prosecutorial misconduct, such as withholding exculpatory or impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Such claims, by their very nature, tend to surface only after a defendant's trial and conviction and require development of predicate facts that are not part of the trial record. *See, e.g., Cone v. Bell,*

See Smith v. Ohio Dep't of Rehab. & Corr., 463 F.3d 426, 433-34 (6th Cir. 2006) (holding that a "court's ultimate decision regarding a particular legal proceeding is *part of that legal proceeding*, and appointed counsel's duties . . . include the duty of informing her client of the outcome of the proceeding . . . in a timely fashion so that the accused retains his control over the decision to appeal"). In a capital case where "there are nonfrivolous grounds for appeal," this duty follows *a fortiori* from *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

[24] *See, e.g., State ex rel. Thomas v. Rayes*, 153 P.3d 1040, 1043-44 (Ariz. 2007); *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); *Commonwealth v. Grant*, 813 A.2d 726, 735-38 (Pa. 2002) (cataloging cases).

556 U.S. __, 129 S. Ct. 1769, 1786 (2009); *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

For such claims, the *Giarratano* plurality's reasoning that "direct appeal is the primary avenue for review of capital cases," and that state post-conviction "serve[s] a different and more limited purpose," no longer applies. 492 U.S. at 10, 11 (plurality opinion). Rather, just as this Court concluded with respect to the procedures at issue in *Halbert*, state post-conviction review of a claim that could not have been litigated on direct appeal "ranks as a first-tier appellate proceeding requiring appointment of counsel" under the Due Process and Equal Protection Clauses. 545 U.S. at 609-10.

C. In the alternative, the Court should hold that a federal habeas petitioner has cause to excuse procedural default resulting from state post-conviction counsel's errors that would rise to the level of a constitutional violation if committed at trial or on direct appeal.

Normally, federal habeas courts will not adjudicate claims that are procedurally defaulted by an independent and adequate state rule. This important practice "is grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. Yet the cause-and-prejudice standard that sometimes excuses procedural default recognizes that — to ensure the "ends of justice" and vindicate constitutional rights — federal courts, under some circumstances, must reach the merits of constitutional claims that were denied for procedural reasons in state court. *See Schlup v. Delo*, 513 U.S. 298, 319-21 (1995). The

cause-and-prejudice test is grounded in "'equitable principles' [that] have traditionally 'governed' the substantive law of habeas corpus." *Holland*, 130 S. Ct. at 2560 (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)); *Schlup*, 513 U.S. at 319 ("[T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy."). In applying these equitable principles, this Court has latitude to determine and reevaluate, when necessary, the contours of cause and prejudice.

In light of the developments since *Giarratano* and *Coleman* described in Section II *supra*, competent state post-conviction counsel is now necessary for the proper litigation of constitutional claims that go to the fundamental fairness of a capital conviction and sentence. But even if this Court declines to use this case as a opportunity to recognize a federal constitutional right to state post-conviction counsel along the lines proposed in either Section III.A or III.B *supra*, it flouts fundamental equitable principles for the federal courts to refuse to consider the merits of defaulted claims in a capital case where state post-conviction counsel presents a federal constitutional claim to the state post-conviction court in a manner that is so procedurally improper that the conduct would violate *Strickland*, 466 U.S. 668, if committed by trial or direct appeal counsel. That is not to say that all errors by state post-conviction counsel should provide cause to excuse a state procedural default. *Cf. Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). But where, as in this case, state post-conviction counsel failed to act in a minimally competent manner in a capital case, their deficient per-

formance should satisfy the first prong of the cause-and-prejudice test.

Although the Court in *Coleman* was unwilling to excuse a state procedural default under this line of reasoning, 501 U.S. at 753-56, the equitable principles underlying federal habeas review allow the Court to respond to new circumstances where, as here, there is no statutory provision directly applicable. *Cf. Holland*, 130 S. Ct. at 2563 ("'The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices.'") (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (alterations omitted)). The "equitable inquiry required by the ends of justice," *Schlup*, 513 U.S. at 320, mandates such a reexamination in light of the developments in post-conviction practice discussed above.

D. Another option would be to find cause to excuse procedural default in a state such as Alabama that fails to provide the minimum constitutional safeguards that *Giarratano* requires.

Justice Kennedy's controlling concurrence in *Giarratano* adopted a fact-sensitive approach to determining whether the constitutional right of meaningful access to the courts requires recognition of an ancillary right to appointment of counsel in state post-conviction proceedings for capital cases. *See* 492 U.S. at 14-15 (Kennedy, J., concurring in the judgment).

Under this fact-sensitive approach, the present case stands in stark contrast to *Giarratano*. Neither of the two circumstances that Justice Kennedy identified in his concurrence as crucial to the outcome is true in Alabama today.

First, Virginia's "prison system [was] staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id.* at 14-15. Conversely, Alabama provides neither institutional lawyers nor any other form of state-funded assistance to help condemned prisoners prepare petitions for state post-conviction relief. *See* Equal Justice Initiative, *The Death Penalty in Alabama* 2 (Jan. 2011), *available at* http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf.

Second, at the time of *Giarratano*, "no prisoner on death row in Virginia [was] unable to obtain counsel to represent him in postconviction proceedings." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). By contrast, some Alabama death-sentenced prisoners have been unable to secure representation for all or a significant portion of their post-conviction proceedings. *See* Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 159 (June 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf. That number would be far greater were it not for the support of mostly out-of-state *pro bono* resources which, as this case reveals, are not always a reliable alternative to a state-funded, coordinated program.

In light of these and other serious flaws in Alabama's procedures for capital cases, *see* Pet. Br. 3-6, the state fails to provide the minimal constitutional safeguards required by Justice Kennedy's controlling concurrence in *Giarratano*. Indeed, Alabama is a distinct outlier in comparison to the vast majority of death-penalty states that provide at least some level of access to counsel in capital post-conviction proceedings. *See* Section II.C *supra*. Neither *Giarratano* nor *Coleman* justifies rigid application of procedural default rules to death-sentenced prisoners who are compelled to run the gauntlet of a post-conviction process like Alabama's. Accordingly, this Court should hold that, at least in Alabama capital cases, a federal habeas petitioner can demonstrate cause to excuse procedural default resulting from deficient performance by state post-conviction counsel.

E. *Coleman* and *Giarratano* should not be extended to preclude federal habeas review for a death-sentenced prisoner abandoned by state post-conviction counsel.

Even if the Court does not take any of the foregoing steps to safeguard the constitutional rights of death-sentenced prisoners who do not receive minimally competent assistance of counsel in state post-conviction proceedings, it should not extend the reasoning of *Giarratano* and *Coleman* to the distinctive facts at issue here. Relying on the plurality's reasoning in *Giarratano*, *Coleman* held that, on federal habeas review, attorney ineffectiveness in state post-conviction proceedings is not normally sufficient to establish cause for noncompliance with a state procedural rule. That holding was premised on the

notion that "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation," and, therefore, except in circumstances where the Constitution gives a litigant a right to counsel, "the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Yet, as Justice Alito recently pointed out, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment). Where an attorney's misconduct amounts to abandonment of his client and that attorney's abandonment is responsible for a procedural default in state post-conviction proceedings, that default "cannot fairly be attributed" to the client. *Coleman*, 501 U.S. at 753. In these circumstances, the Court should hold that a death-sentenced petitioner has cause to excuse the default and obtain federal habeas review of the merits of his claims. *See* Pet. Br. 35-52. To hold otherwise would amount to a significant extension of *Coleman* and *Giarratano* in complete disregard for the agency law principles upon which those decisions were premised. *See Holland*, 130 S. Ct. at 2564-65; *see also id.* at 2566-68 (Alito, J., concurring in part and concurring in the judgment) (distinguishing the circumstances in *Coleman* from the kind of abandonment which, under "'well-settled principles of agency law,'" prevents counsel's actions from being constructively attributable to the client) (quoting *Coleman*, 501 U.S. at 754).

As this Court recently held, attorney misconduct that amounts to abandonment under agency law principles warrants equitable tolling of AEDPA's statute of limitations. *See Holland*, 130 S. Ct. at 2564-65. The same type of attorney misconduct should also generally establish a break in the agency relationship sufficient for a capital petitioner to establish cause to excuse a procedural default.[25]

Here, the evidence of attorney abandonment was at least as clear as it was in *Holland*. Maples's two lead attorneys of record left their law firm and accepted new employment that prevented them from continuing to represent their client — and they did so without seeking permission to withdraw from the court or substituting alternate counsel. *See* Pet. Br. 9-11. As a result, they ceased "operating as his agent in any meaningful sense of that word," *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring in part and concurring in the judgment), and thus provided sufficient cause to excuse any resulting procedural default. *See* Pet. Br. 39-52.

F. Extension of *Coleman* and *Giarratano* is particularly inappropriate where the state is aware of, and takes inadequate steps to address, abandonment by post-conviction counsel.

The narrowest ground for deciding this case turns on the state's own complicity in Maples's procedural default. It is axiomatic that where the acts or know-

---

[25] As noted *supra* at 18-19 & n.16, some states take a similar approach in providing relief under state law when post-conviction counsel effectively abandons a death-sentenced prisoner.

ing omissions of state officials are responsible for a petitioner's noncompliance with a state procedural rule, that petitioner has cause to excuse the default on federal habeas review. *See, e.g.*, *Banks*, 540 U.S. at 692-96; *Strickler v. Greene*, 527 U.S. 263, 283-84, 288 (1999); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). In such circumstances, the default results from "something *external* to the petitioner, something that cannot fairly be attributed to him," and thus it would be inequitable to require a blameless petitioner to bear the consequences of that default. *Coleman*, 501 U.S. at 753; *see also Carrier*, 477 U.S. at 488; Pet. Br. 22-34.

Here, Maples's default was fairly attributable to the state. When copies of the post-conviction court's order mailed to Maples's two lead attorneys of record were returned unopened with "Return to Sender — Left Firm" written on the envelope, the court clerk's office did nothing; it made no effort to contact the two attorneys, anyone else at their former firm, local counsel, or even Maples himself before the appeal deadline passed. *See* Pet. Br. 10-12.

The Court's decision in *Jones v. Flowers*, 547 U.S. 220, 229 (2006), makes clear that it is particularly inappropriate to extend *Coleman* and *Giarratano* to prohibit federal habeas review under the circumstances of this case. In *Jones*, the Court held that, when the loss of a home is at stake, the Due Process Clause prohibits state officials from sitting on their hands after an important state-issued notice is returned unopened and unclaimed; instead, those officials must make further efforts to ensure adequate notice. 547 U.S. at 234. Similarly, where the "important and irreversible prospect" of a death sen-

tence is at stake, *id.* at 230, the Constitution cannot permit the state to merely "shrug [its] shoulders . . . and say 'I tried,'" *id.* at 229.[26] Although not always necessary, *see* Sections III.C and III.E *supra*, a constitutional violation is certainly sufficient to establish cause to excuse a state-court procedural default. *See Coleman*, 501 U.S. at 752-55; *Carrier*, 477 U.S. at 488.

CONCLUSION

For the foregoing reasons and those outlined by petitioner, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

JOHN PAYTON
Director-Counsel
Counsel of Record
DEBO P. ADEGBILE
CHRISTINA SWARNS
JOHNATHAN SMITH
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Fl.
New York, NY 10013
(212) 965-2200
jpayton@naacpldf.org

---

[26] This constitutional violation is not cured by the fact that Maples's local counsel received notice. It is unreasonable for Alabama to rely solely on notice to local counsel when the state is aware that, as a result of its failure to support an adequate system of post-conviction counsel, out-of-state firms working *pro bono* and public interest groups serve as primary counsel for its death-row population. *See* Pet. Br. 29-33.

JOSHUA CIVIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I St., NW, 10th Fl.
Washington, DC 20005

SAMUEL SPITAL
SQUIRE, SANDERS &
DEMPSEY (US) LLP
30 Rockefeller Plaza
23rd Fl.
New York, NY 10112

Counsel for Amicus Curiae

May 25, 2011

APPENDIX

Appendix

Survey of State Provision of Counsel for Indigent Death-Sentenced Prisoners in State Post-Conviction Proceedings

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Alabama	No	No (but courts have discretion to appoint counsel after the petition is filed) Ala. Code § 15-12-23(a); Ala. R. Crim. P. 32.7(c)
Arizona	Yes Ariz. Rev. Stat. Ann. § 13-4041(B)	n/a
Arkansas	Yes Ark. R. Crim. P. 37.5(b)	n/a
California	Yes Cal. Gov't Code § 68662; *In re Anderson*, 447 P.2d 117, 131 (Cal. 1968)	n/a
Colorado	Yes Colo. Rev. Stat. § 16-12-205(1)	n/a
Connecticut	Yes Conn. Gen. Stat. § 51-296	n/a
Delaware	Yes Del. Super. Ct. R. Crim. P. 61(1)(3)	n/a
Florida	Yes Fla. R. Crim. P. 3.851(b)	n/a
Georgia	No *Gibson v. Turpin*, 513 S.E.2d 186, 188 (Ga. 1999)	No

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Idaho	Yes Idaho Crim. R. 44.2(1)	n/a
Indiana	No	Yes (as long as the public defender "determines the proceedings are meritorious and in the interests of justice") Ind. R. of P. for Post-Conviction Remedies 1, § 9
Kansas	No	Yes Kan. Stat. Ann. § 22-4506(d)(2)
Kentucky	No (but the Kentucky Department of Public Advocacy may assign counsel pursuant to Ky. Rev. Stat. § 31.110(2)(c); *see also Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001))	Yes (as long as the petition raises material issues of fact) Ky. R. Crim. P. 11.42(5)
Louisiana	Yes La. Rev. Stat. Ann. § 15:178	n/a
Maryland	No	Yes Md. Code Ann. Crim. Proc. § 7-108(a); Md. Rule 4-401
Mississippi	Yes Miss. Code Ann. § 99-39-23(9)	n/a
Missouri	No	Yes Mo. Rev. Stat. §§ 547.360(5), 547.370
Montana	Yes Mont. Code Ann. § 46-21-201(3)	n/a

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
Nebraska	Yes (provided that the public defender considers the proceedings "meritorious and in the interest of justice") Neb. Rev. Stat. § 23-3402(1)	n/a
Nevada	No	Yes Nev. Rev. Stat. § 34.820(1)(a)
New Hampshire *	No	No (but the trial court has discretion to appoint counsel to assist post-conviction petitioners in "complicated" cases) *State v. Hall*, 908 A.2d 766, 770 (N.H. 2006)
North Carolina	Yes N.C. Gen. Stat. § 7A-451(c)	n/a
Ohio	Yes Ohio Rev. Code Ann. § 2953.21(I)(1)	n/a
Oklahoma	Yes Okla. Stat. tit. 22, § 1089(B)	n/a
Oregon	No	Yes Or. Rev. Stat. § 138.590
Pennsylvania	Yes Pa. R. Crim. P. 904(H)(1)	n/a
South Carolina	No	Yes S.C. Code Ann. § 17-27-160(B)

STATE	PROVIDES A RIGHT TO COUNSEL *BEFORE* POST-CONVICTION PETITION FILED	PROVIDES A RIGHT TO COUNSEL *AFTER* POST-CONVICTION PETITION FILED
South Dakota	No	Yes S.D. Codified Laws § 21-27-4
Tennessee	No	Yes Tenn. Code Ann. § 40-30-107(b)(1)
Texas	Yes Tex. Code Crim. Proc. Ann. art. 11.071(2)	n/a
Utah	Yes Utah Code Ann. § 78B-9-202	n/a
Virginia	Yes Va. Code Ann. § 19.2-163.7	n/a
Washington	Yes Wash. Rev. Code § 10.73.150(3)	n/a
Wyoming	No	Yes Wyo. Stat. Ann. § 7-6-104(c)(ii)

* Under the current statutory regime in New Hampshire, there has been only one death sentence, and it is still pending on direct review. *See State v. Addison*, 7 A.3d 1225, 1256 (N.H. 2010).

AMICUS CURIAE BRIEF

No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF ALABAMA AS *AMICI CURIAE* SUPPORTING PETITIONER

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2500

JONATHAN HACKER
Co-Chair, *Amicus* Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20815
(202) 383-5300

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ARPAN A. SURA
MATTHEW C. PHILLIPS
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
ALABAMA'S DEATH PENALTY SYSTEM SUFFERS FROM NUMEROUS REINFORCING DEFICIENCIES THAT BREED INDIFFERENCE FOR THE RIGHTS OF CAPITAL DEFENDANTS AND WERE THE CAUSE OF THE PROCEDURAL DEFAULT.	4
A. Alabama's Death Penalty System Has Been Broadly Condemned As "Broken".	4
B. Alabama's Capital System Is Inadequate At Every Stage In The Process	7
1. Capital Trials: Inexperienced, Underpaid, And Ineffective Lawyers	7
2. The Jury: Confusion And Racial Disparities In The Application Of The Death Penalty	11
3. Sentencing: Judicial "Overrides" And Elected Judges	13
4. Direct Appeal And Post-Conviction: Underpaid And Ineffective Counsel, If Any	17
C. Alabama's Intransigence	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002)	9
Ex parte Pierce, 851 So. 2d 618 (Ala. 2002)	9
Ex parte Womback, 541 So. 2d 47 (Ala. 1988)	9
Harris v. Alabama, 513 U.S. 504 (1995)	15
Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995)	9
Lawhorn v. Allen, 519 F.3d 1272 (11th Cir. 2008), *cert. denied*, 131 S. Ct. 252 (2010)	9
McGowan v. State, 990 So. 2d 931 (Ala. Crim. App. 2003)	8
Roper v. Simmons, 543 U.S. 551 (2005)	22
State v. Gamble, No. CR-06-2274, 2010 WL 3834280 (Ala. Crim. App. Oct. 1, 2010)	9
State v. Smith, No. CR-06-0898, 2010 WL 3834332 (Ala. Crim. App. Oct. 1, 2010)	9
Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008)	9

TABLE OF AUTHORITIES—Continued

STATUTES Page

Ala. Code § 13A-5-47(d)-(e) 13

Ala. Code § 13A-5-54 8

Ala. Code § 15-12-4(a) 7

Ala. Code § 15-12-22(b) 17

Ala. Code § 15-12-22(d)(3) 17

Ala. Code § 15-12-23(a) 18

Ala. Code § 15-12-23(d) 19-20

RULES

Ala. R. Crim. P. 21.1 ..... 11, 12

Ala. R. Crim. P. 32.7(c) 18

OTHER AUTHORITIES

Ala. Sentencing Comm'n, *Recommendations for Reform of Alabama's Criminal Justice System: 2003 Report* (2003), *available at* http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf 13

Am. Bar Ass'n, *Compliance with ABA Policies* (2007), *available at* http://www.abanow.org/2007/10/aba-study-chart-state-by-state-analysis-of-death-penalty-systems 6

Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (2006) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* (2006) 18, 19

Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DPen0709.pdf/$file/DPen0709.pdf 8

Am. Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama* (2005).....*passim*

Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. App. Prac. & Process 347 (2003). 18

Attorney General Bill Pryor, *Alabama Executes Only the Guilty* (July 2000), http://www.ago.state.al.us/issue/guilty.htm..... 21

Bob Johnson, *Courtney Lockhart, Iraq Vet, Convicted in Slaying of Lauren Burk*, Huffington Post (Nov. 18, 2010), http://www.huffingtonpost.com/2010/11/18/courtney-lockhart-iraqve_n_785646.html 14

Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).....*passim*

Brief in Opposition, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) 20

TABLE OF AUTHORITIES—Continued

Page

Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339 (2006) 19

Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 Tulsa L. Rev. 253 (2006) 18-19

The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) 14

David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. Times, June 16, 2001 ..... 16, 20

Editorial, *Our View: Alabama Lawmakers Should Pass Legislation to Put a Three-Year Halt to Imposing Death Sentences or Carrying Out Executions*, Birmingham News, Apr. 25, 2011 7

Equal Justice Initiative, *Alabama's Death Sentencing and Execution Rates Continue to be Highest in the Country* (Feb. 3, 2011), http://www.eji.org/eji/node/503 24

Equal Justice Initiative, *Criminal Justice Reform in Alabama, Part Two: Judicial Selection in Alabama* (2006), *available at* http://eji.org/eji/files/judicialselectionreportsm.pdf 16

TABLE OF AUTHORITIES—Continued

Page

Equal Justice Initiative, *Crisis of Counsel, available at* http://www.eji.org/eji/files/crisisofcounsel.pdf 19, 20

Equal Justice Initiative, *The Death Penalty in Alabama* 2 (2011), *available at* http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf 12, 14, 16, 19

Equal Justice Initiative, *Judge Override*, http://eji.org/eji/deathpenalty/override 17

Equal Justice Initiative, *Judicial Override in Alabama* (2008), *available at* http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf 13

Equal Justice Initiative, *Study Shows Money Influenced Judicial Elections With Alabama Spending At The Top* (Aug. 22, 2010), http://www.eji.org/eji/node/464 15

Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079 (2006) 19, 20

James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf 22

John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 Cornell L. Rev. 435 (2011) 21

TABLE OF AUTHORITIES—Continued

Page

Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases After* Alabama v. Shelton, 63 Ala. Law. 370 (2002) 10

Justice Tom Parker, Op-Ed, *Alabama Justices Surrender to Judicial Activism*, Birmingham News, Jan. 1, 2006 22-23

NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Spring 2010* (2010), *available at* http://naacpldf.org/files/publications/DRUSA_Spring_2010.pdf 12, 24

Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923 (1994) 11

Petition for a Writ of Certiorari, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) 22

Phillip Rawls, *ABA: Stop the Executions*, Montgomery Advertiser, June 11, 2006 22

Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 Ala. L. Rev. 1 (1992) 10, 11

Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. Times, Mar. 1, 2000 10

TABLE OF AUTHORITIES—Continued

Page

Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum – Mission to the United States of America*, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009) ..... *passim*

Stan Diel, *United Nations Report Calls Alabama's Death Penalty System Broken, Says Innocents May Have Been Executed*, Birmingham News, July 2, 2008 22

Subcomm. on Fed. Death Penalty Cases, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) 11

Sue Bell Cobb for Chief Justice – Only, YouTube (Sept. 27, 2006), http://www.youtube.com/watch?v=y2guyWS57OA 16

Tony Mauro, *Brief of the Week: In a Capital Case, Trying to Correct a Law Firm's Mistake*, Nat'l L.J., Aug. 4, 2010..... 20-21

Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2009 – Statistical Tables* (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf..... 23-24

TABLE OF AUTHORITIES—Continued

Page

Web Staff, *Judge Imposes Death Penalty, Outburst Delays the Trial*, Fox News (Mar. 4, 2011), http://www.myfoxal.com/story/14170559/2011/03/02/sentencing-underway-in-the-courtney-lockhart-trial 14

William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931 (2006)..... 15

STATEMENT OF INTEREST [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL often files *amicus* briefs in this Court in capital and other cases that implicate its interest in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Alabama is one of its state affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court, including many involving state capital punishment systems. In 2005, the ACLU published a report concerning the Alabama death penalty system at issue in this case, titled *Broken Justice: The Death Penalty in Alabama.*

---

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

Amici have a substantial interest in ensuring that petitioner is not executed without federal review of serious constitutional claims under the circumstances of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alabama seeks to execute petitioner without any federal court review of serious constitutional errors because of a missed filing deadline that everyone agrees was not his fault. While petitioner's state habeas petition was pending, petitioner's *pro bono* lawyers abandoned him. They left their New York law firm and moved on with their careers, without notifying the Alabama court, the court clerk's office, local counsel, or their client who was sitting on Alabama's death row. When the Alabama court denied the petition, the clerk's office sent the orders to petitioner's New York counsel of record, but the orders were sent back to the clerk unopened, marked "Return to Sender—Left Firm." While the clock on the appeal deadline ticked away, the clerk did not pick up the telephone and call petitioner's counsel of record, even though the clerk had their home phone numbers. Nor did the clerk contact the lawyers' former law firm or attempt to notify petitioner directly. Instead, the clerk inexplicably did nothing. By the time the State's attorney finally notified petitioner of the court's orders, the deadline to appeal had expired. The State then successfully used the missed deadline as the basis to deny petitioner all federal court habeas review.

Petitioner thus was deprived of the opportunity to challenge in federal court the facially ineffective assistance of counsel he received at trial. Petitioner was represented at trial by court-appointed lawyers

who each were paid a cap of $1,000 for all of their preparation and who lodged an anemic defense that lasted only a few hours. Like so many appointed lawyers in Alabama capital cases, they were in over their heads and aptly told the jury that they were "stumbling around in the dark." Pet. Br. 8.

Petitioner correctly asserts that the inexplicable failures of the Alabama clerk's office constitute "cause" to excuse any procedural default. The clerk's conduct, however, is not an isolated incident of indifference by the State. Rather, it is symptomatic of the broader culture of callousness and unfairness that permeates Alabama's death penalty system.

Alabama's woefully deficient death penalty system has been criticized by former Alabama judges, Alabama lawyers, Alabama law professors, Alabama legislators, and leaders of the Alabama Bar. A report by *amicus* ACLU found that the system is "broken" in numerous respects, including the State's failure to provide counsel to death row inmates in state post-conviction proceedings. A 265-page American Bar Association ("ABA") study found the Alabama death penalty system so deficient that "fairness and accuracy breakdowns in capital cases are virtually inevitable," specifically highlighting Alabama's failure to provide qualified trial counsel to indigent capital defendants. And just last month, a major Alabama newspaper called for a state-wide moratorium on all death sentences and executions for three years to give the State time to address "the flagrant flaws in Alabama's system of capital punishment."

Despite these substantial and sustained critiques, Alabama has shown a "shocking lack of urgency with regard to the need to reform glaring criminal justice system flaws." State officials have been "strikingly

indifferent to the risk of executing innocent people and have a range of standard responses, most of which are characterized by a refusal to engage with the facts." The State's then-Attorney General, for instance, attacked the ABA as "a liberal, activist organization," rather than respond to the criticisms of Alabama's capital system on the merits.

In light of the record of systemic failures, it is hardly surprising that a local court clerk did not make a simple phone call to notify petitioner or his counsel of a decision that could lead to his execution. No legitimate system of capital punishment could put a person to death in these circumstances. Reversal of the decision below is needed as a check on Alabama's broken capital punishment system.

ARGUMENT

ALABAMA'S DEATH PENALTY SYSTEM SUFFERS FROM NUMEROUS REINFORCING DEFICIENCIES THAT BREED INDIFFERENCE FOR THE RIGHTS OF CAPITAL DEFENDANTS AND WERE THE CAUSE OF THE PROCEDURAL DEFAULT

Petitioner correctly asserts that the Alabama court clerk's failures in this case are "cause" to excuse any procedural default. Pet. Br. 22-34. The clerk's conduct reflects the culture of indifference and unfairness that pervades Alabama's capital system. This case should be evaluated against the backdrop of that system.

A. Alabama's Death Penalty System Has Been Broadly Condemned As "Broken"

Alabama's death penalty system repeatedly has been singled out for failing to provide defendants

with the most basic of trial and post-conviction protections in capital cases.

A coalition of former Justices of the Alabama Supreme Court and the Alabama Court of Criminal Appeals, joined by former Alabama State Bar Presidents, previously advised this Court that "[o]ur capital system in Alabama is in disarray." Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari at 19, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) [hereinafter *Barbour* Justice-*amici*]. These former Alabama jurists and leading practitioners, who have seen the problems firsthand, called Alabama a "compromised system . . . that renders many verdicts and sentences unreliable." *Id.* at 5.

Amicus ACLU has studied Alabama's capital processes and concluded that the "structure of the state's criminal justice system and the power given to its trial and appellate judges compromise and limit the ability of capital defendants to get a fair trial and appropriate sentencing." Am. Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama* 1 (2005) [hereinafter ACLU Report]. The ACLU's study concluded that Alabama "does not provide adequate indigent defense"; that the State has wrongfully convicted, and possibly executed, innocent people; that "[p]rosecutorial misconduct in death penalty cases is a major problem"; and that race often plays an improper role in death penalty prosecutions. *Id.* at 4-22.

In a comprehensive study, the ABA found Alabama's capital system so deficient that it called on the State to impose a moratorium on executions. Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty*

Assessment Report vi (2006) [hereinafter ABA Report]. The ABA's study resulted from a three-year review led by prominent Alabamans, including a state senator, a district attorney, a law school dean, and a former federal magistrate. This team measured Alabama's capital system against standardized protocols developed by the ABA to evaluate key aspects of death penalty administration. *Id.* at i-ii. Alabama's system complied with only four of eighty protocols. *See id.* at vii-xxviii. Indeed, Alabama failed more of the ABA protocols than any of the seven other state death penalty systems that the ABA has studied to date. *See* Am. Bar Ass'n, *Compliance with ABA Policies* 1-21 (2007), *available at* http://www.abanow.org/2007/10/aba-study-chart-state-by-state-analysis-of-death-penalty-systems.

Alabama's capital system also has garnered international disapproval. The United Nations Human Rights Council, whose investigator examined the system and interviewed State officials, found that Alabama processes are "simply not designed to uncover cases of innocence, however compelling they might be." Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum – Mission to the United States of America*, ¶ 8, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009) [hereinafter U.N. Report]. The U.N.'s study found that the election of judges in Alabama has a "significant impact" on capital cases and results in "politicizing death sentences"; that "existing programs for providing criminal defense counsel to indigent defendants are inadequate"; and that racial disparities were present in the application of the Alabama death penalty. *Id.* at ¶¶ 11-18.

Just last month, the *Birmingham News* editorial board called on Alabama lawmakers to adopt a three-year moratorium on imposing death sentences and carrying out executions to allow the State time to address "the flagrant flaws in Alabama's system of capital punishment." Editorial, *Our View: Alabama Lawmakers Should Pass Legislation to Put a Three-Year Halt to Imposing Death Sentences or Carrying Out Executions*, Birmingham News, Apr. 25, 2011. The outlook for this proposal is bleak. As the *Birmingham News* reported, "legislation to address flaws in Alabama's death penalty seems to be even more lifeless than usual." *Id.* In all events, the consensus is the same: the Alabama system is broken.

B. Alabama's Capital System Is Inadequate At Every Stage In The Process

1. Capital Trials: Inexperienced, Underpaid, And Ineffective Lawyers

a. Alabama has no statewide public defender system. Instead, each of the State's forty-one regional judicial circuits is responsible for setting up its own system to provide counsel to indigent defendants. That approach creates "a hodge-podge of systems that varies by judicial circuit in both type and quality." ABA Report, *supra*, at iii. Alabama law requires each judicial circuit to establish an advisory commission regarding the provision of indigent defense. Ala. Code § 15-12-4(a). Many circuits, however, have failed to set up any commission, and in other circuits, commissions exist in name only. ABA Report, *supra*, at 98. The ABA's study identified only one circuit that utilized a centralized public defender office to handle capital cases, while the majority of circuits relied on individual trial judges to appoint capital counsel on a case-by-case basis. *Id.* at 99.

Alabama requires only one qualification before a court may appoint a lawyer to represent a capital defendant at trial: five years of criminal practice experience. Ala. Code § 13A-5-54. There is no requirement of any experience or training in capital cases. *See id.* This bare-bone standard falls far short of the ABA Guidelines for capital representation, which require no fewer than two attorneys with comprehensive training in capital defense and demonstrated trial experience. ABA Report, *supra*, at 117-20; Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 5-10 (2003) [hereinafter ABA Guidelines], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DPen0709.pdf/$file/DPen0709.pdf.

Even worse, as former Alabama judges have noted, the State's deficient standard is "not consistently followed; exceptions by lower courts are made." *Barbour* Justice-*amici*, *supra*, at 5. In one capital case, for instance, the Alabama trial court approved the appointment of an unqualified lawyer because none of the lawyers in the appointment pool had five years of experience. *McGowan v. State*, 990 So. 2d 931, 993-95 (Ala. Crim. App. 2003). By contrast, the ABA Guidelines require ongoing monitoring and evaluation of the quality of lawyers in the capital appointment pool, and lawyers must be removed from the pool when there is evidence that they "failed to provide high quality legal representation." ABA Guidelines, *supra*, at 8.

"Due in part to the lax appointment standards, the problem of ineffective assistance of counsel is real." ABA Report, *supra*, at 117. Federal and state courts repeatedly have found that appointed counsel

provided ineffective assistance to Alabama capital defendants in numerous respects, including:

- failing to investigate or present mitigating evidence. *Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008); *Brownlee v. Haley*, 306 F.3d 1043, 1074-75 (11th Cir. 2002); *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995); *State v. Smith*, No. CR-06-0898, 2010 WL 3834332, at *17 (Ala. Crim. App. Oct. 1, 2010); *State v. Gamble*, No. CR-06-2274, 2010 WL 3834280, at *12 (Ala. Crim. App. Oct. 1, 2010).
- failing to investigate impeachment evidence. *Ex parte Womback*, 541 So. 2d 47, 70-71 (Ala. 1988).
- failing to make a closing argument at sentencing "based on a gross misunderstanding of a clear rule of Alabama criminal procedure." *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008), *cert. denied*, 131 S. Ct. 252 (2010).
- failing to raise a claim based on inappropriate witness contact with the jury. *Ex parte Pierce*, 851 So. 2d 618, 621 (Ala. 2002).

The lawyers appointed to represent petitioner at his death penalty trial are the paradigmatic example of what capital defendants in Alabama can expect: constitutionally inadequate and inexperienced lawyers who admittedly were "stumbling around in the dark." Pet. Br. 8; *accord id.* at 6-9 (describing petitioner's trial).

b. Beyond the exceedingly low qualification bar, lack of sufficient funding for indigent capital defense in Alabama breeds ineffective assistance. At the time

of petitioner's trial, "many current death row inmates were convicted when the state imposed *grossly inadequate* compensation caps on the attorneys appointed to represent them." *Barbour* Justice-*amici*, *supra*, at 5; *see also* ABA Report, *supra*, at 106-07, 126-29; U.N. Report, *supra*, at ¶¶ 14-16. Though this fee cap is no longer in place, petitioner's appointed trial counsel each were paid a total of $1,000 for all of their work preparing for the guilt and sentencing phases of his trial. Pet. Br. 6.

Because of the notoriously low pay and lack of sufficient funding to defend capital cases, Alabama lawyers historically have been loath to take a death penalty appointment. One lawyer reportedly said he would go to jail before accepting another appointment because the State provides insufficient pay and expenses to properly defend capital cases. Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. Times, Mar. 1, 2000; *see also* Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases After* Alabama v. Shelton, 63 Ala. Law. 370, 373 (2002) (discussing lack of funds to adequately defend cases).

It is unsurprising, then, that Alabama capital trials lack the indicia of a vigorous defense. In one study of indigent defense in Alabama, "the attorney of record did not file any motions in 72% of the capital and non-capital felony cases. In the cases where motions were filed, 71% of them were 'canned,' non-case specific motions." ABA Report, *supra*, at 119. The length of capital trials in Alabama also suggests a virtually non-existent defense. One study found that more than 75% of Alabama capital trials lasted less than a week. Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense*

Problems: It's a Dollars and Sense Thing, 44 Ala. L. Rev. 1, 37 n.185 (1992). The penalty phase of capital trials in the study lasted an average of one hour. *Id.* at 35. Petitioner's capital trial was no different; it lasted four days, most of which was dedicated to the State's case against petitioner. Pet. Br. 8-9. The defense put on roughly one hour of testimony. *Id.* And the sentencing phase was completed after a lunch break on the day of petitioner's conviction. *Id.*

By contrast, a study for the Judicial Conference of the United States found that federal defenders billed, on average, 1,889 hours in capital trials. *See* Subcomm. on Fed. Death Penalty Cases, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 11 (1998). This included 409 "in court hours," or the equivalent of fifty-one eight-hour days in court. *Id.* "In states that have mandatory training or rigorous appointment standards for death penalty defense, trials average from three weeks to two months." Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923, 1928 n.53 (1994). These figures are consistent with capital trial standards, and common sense, that "it should take several thousand hours to adequately prepare for a death penalty trial." ABA Report, *supra*, at 120.

2. The Jury: Confusion And Racial Disparities In The Application Of The Death Penalty

Compounding the problem of an appointment system that fosters inadequate trial counsel, Alabama also fails to ensure the reliability of the jury system. Alabama instructs judges not to provide the jury with written instructions as a general rule. Ala.

R. Crim. P. 21.1. That failure occurs despite studies demonstrating that written instructions "result in more efficient and worthwhile deliberations." ABA Report, *supra*, at 206. As a result, Alabama capital jurors "commonly have difficulty understanding jury instructions." *Id.* at 207. One study found that the majority of jurors did not understand several basic concepts governing the application of mitigating and aggravating factors, "an understanding which is absolutely necessary to properly recommend a sentence in a capital case." *Id.* at 208.

The failure adequately to instruct and inform jurors inevitably leads to verdicts and sentences based on impermissible considerations. Such issues may help to explain the racial disparities that exist in the application of Alabama's death penalty. *See* ACLU Report, *supra*, at 21-22; U.N. Report, *supra*, at ¶ 17 n.20. "In Alabama, 80% of all death sentences are imposed in cases with white victims even though 65% of all murder victims in the state are African American." Equal Justice Initiative, *The Death Penalty in Alabama* 2 (2011) [hereinafter EJI *Death Penalty*], *available at* http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf. "Similarly, although only six percent of all murders in Alabama involve black defendants and white victims, over sixty percent of black death-row inmates have been sentenced for killing someone white." ABA Report, *supra*, at 240. As of 2010, more than half of Alabama's death row—103 out of 204 inmates—were racial minorities, even though minorities comprise less than one-third of the State's population. *See* NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Spring 2010*, at 38 (2010) [hereinafter NAACP Report], *available at* http://naacpldf.org/files/publications/DRUSA_Spring_2010.pdf.

State officials have recognized that "unwarranted sentencing disparity does exist in Alabama," and that the disparity is "problematic when such non-legal factors as location of the courtroom, race, wealth or sex are critical in determining the offender's sentence." Ala. Sentencing Comm'n, *Recommendations for Reform of Alabama's Criminal Justice System: 2003 Report* 27-28 (2003), *available at* http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf. Yet, "there is no indication that [the State] has taken steps to develop new strategies that strive to eliminate the impact of racial discrimination in capital sentencing," including to provide written instructions to juries. ABA Report, *supra*, at 238.

3. Sentencing: Judicial "Overrides" And Elected Judges

a. Alabama is one of only three states that allow a trial judge to "override" a jury's sentence and impose a different one. *See* Ala. Code § 13A-5-47(d)-(e); Equal Justice Initiative, *Judicial Override in Alabama* 1 (2008), *available at* http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf (listing Delaware and Florida as other states allowing overrides). In other words, even where the jury in an Alabama capital case unanimously imposes a sentence of life imprisonment, the trial judge can override the jury and order the defendant's execution.

Alabama trial judges exercise this power with striking regularity. In 2008, the Equal Justice Initiative reported that "[s]ince the death penalty was reinstated in 1976, Alabama judges have overridden 84 cases from life to death." *Id.* As of 2006, there were "at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation

for a life without parole sentence." ABA Report, *supra*, at v.

Imposing a death sentence over a jury's recommendation of life is the most common use of the judicial override in Alabama. One study found that "90% of overrides in Alabama are used to impose sentences of death." *Id.*; *see also* ACLU Report, *supra*, at 15 (noting that roughly 95% of overrides used to impose death sentence); The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* 88-89 (2005) ("the vast majority of overrides have been to impose death"). As a result of these trends, roughly one-fourth of Alabama's death row inmates "were condemned to death by an elected judge after the jury decided that life was the appropriate sentence." EJI *Death Penalty*, *supra*, at 1.

In a recent example, the jury in a high-profile capital case involving the murder of an Alabama college student entered a unanimous sentence of life without parole for the defendant, a veteran who claimed that he suffered from post-traumatic stress disorder after serving in the Iraq war. At the State's urging, however, the Alabama trial judge overrode the jury's recommendation of life and sentenced the defendant to death on the theory that the defendant "was suspected in other crimes that the jury did not know about." Web Staff, *Judge Imposes Death Penalty, Outburst Delays the Trial*, Fox News (Mar. 4, 2011), http://www.myfoxal.com/story/14170559/2011/03/02/sentencing-underway-in-the-courtney-lockhart-trial; *see also* Bob Johnson, *Courtney Lockhart, Iraq Vet, Convicted in Slaying of Lauren Burk*, Huffington Post (Nov. 18, 2010), http://www.huffingtonpost.com/2010/11/18/courtney-lockhart-iraq-ve_n_785646.html.

b. "[C]omplicating the issue, Alabama is the only state with such override that selects its judges in partisan elections," and studies have linked overrides imposing death to election-year politics. ABA Report, *supra*, at v. "Systematic research finds that this political vulnerability of appellate judges takes a toll on their opinions and voting in capital cases." William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 984 (2006). "In particular, research shows that, in order to attract votes or campaign funds, judges are more likely to impose or refuse to reverse death sentences when: elections are nearing; elections are tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience." U.N. Report, *supra*, at ¶ 10; *see also* Equal Justice Initiative, *Study Shows Money Influenced Judicial Elections With Alabama Spending At The Top* (Aug. 22, 2010), http://www.eji.org/eji/node/464 ("Fueled by 'tough on crime' rhetoric in partisan judicial elections, judicial override in Alabama is on the rise."). As Justice Stevens recognized, "Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." *Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting) (citations omitted).

Candidates for the Alabama bench regularly tout their pro-death penalty views. *See* ABA Report, *supra*, at 226-27 (discussing specific examples); *accord* U.N. Report, *supra*, at ¶ 10. "Almost all of Alabama's elected state appellate court judges campaign on

their strong support for the death penalty and many promise to facilitate and expedite executions in order to win votes." EJI *Death Penalty*, *supra*, at 1. For instance, one judicial campaign ad stated that in capital cases, the candidate was "fighting against minor technicalities that would let criminals off." Equal Justice Initiative, *Criminal Justice Reform in Alabama, Part Two: Judicial Selection in Alabama* 9 (2006), *available at* http://eji.org/eji/files/judicialselectionreportsm.pdf (discussing numerous examples). Another candidate promised "I will turn around death (penalty) cases in six months. . . . That's enough time." *Id.* In fact, one of the Alabama judges who declined to consider petitioner's state habeas appeal appeared in a campaign video stating that "I'm the only candidate for Chief Justice . . . who has sent hundreds of criminals back to death row." *Sue Bell Cobb for Chief Justice – Only*, YouTube (Sept. 27, 2006), http://www.youtube.com/watch?v=y2guyWS57OA.

According to the former presiding judge of the Alabama Court of Criminal Appeals who served two decades on the bench, "[j]udicial politics has gotten so dirty in this state that your opponent in an election simply has to say that you're soft on crime because you haven't imposed the death penalty enough." David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. Times, June 16, 2001. "People run for re-election on that basis," he said, "because the popular opinion in the state is, Let's hang 'em." *Id.*

As a result of the political climate in Alabama, "most judges would prefer not to have this [override] power, because it heighten[s] the pressure to impose the death penalty." *Id.* Nevertheless, "a study of judicial override in Alabama found that trial judges

use life to death overrides more than twice as often in the twelve months before a judicial election than in the years between elections." ABA Report, *supra*, at 228. "In 2008, an election year, 30% of the death sentences were imposed by judicial override of jury life verdicts." Equal Justice Initiative, *Judge Override*, http://eji.org/eji/deathpenalty/override. By contrast, "in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life." ABA Report, *supra*, at v.

4. Direct Appeal And Post-Conviction: Underpaid And Ineffective Counsel, If Any

a. If an indigent defendant is convicted and sentenced to death, the trial court must appoint counsel to "represent and assist the defendant in the appeal." Ala. Code § 15-12-22(b). The lawyer's total fee for handling a capital direct appeal in Alabama is capped at $2,000. *Id.* § 15-12-22(d)(3). Stating the obvious, this fee cap is "far too low to ensure that lawyers have the funds necessary to present a vigorous defense or to attract the most experienced and qualified lawyers to these cases." ABA Report, *supra*, at xiv; *see also* ACLU Report, *supra*, at 5 ("These funding rates and caps are vastly insufficient for the amount of work required to properly represent an inmate's rights."). And the cap undoubtedly drags down the quality of appellate representation. The U.N.'s investigator, for instance, stated that he "read appellate legal briefs, submitted on behalf of defendants on [Alabama's] death row, that barely reached ten pages, did not request oral argument, or were largely a bare restatement of the facts." U.N. Report, *supra*, at ¶ 15.

b. Capital defendants in Alabama fare even worse in post-conviction proceedings. Along with Georgia, "Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings." ABA Report, *supra*, at iv.[2] Instead, Alabama habeas courts "*may* appoint counsel . . . if it appears to the court that the [petitioner] is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary . . . to assert or protect the right of the [petitioner]." Ala. Code § 15-12-23(a) (emphasis added). Even then, there are significant obstacles to discretionary appointments. For one, a court cannot appoint counsel unless the inmate files his own capital habeas petition and the court "does not summarily dismiss the petition." Ala. R. Crim. P. 32.7(c). "[B]y delaying the appointment determination until after the petition has been filed and survived summary dismissal, Alabama effectively eliminates counsel's key responsibilities and places them back in the hands of the petitioner." Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and*

---

[2] Georgia is the only other state in the nation that does not guarantee counsel to death row inmates in state post-conviction proceedings. Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* xiv (2006) [hereinafter ABA Georgia Report] ("[I]ndigent death-sentenced inmates are not entitled to appointed counsel for state post-conviction or clemency proceedings."); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. App. Prac. & Process 347, 364 (2003) (noting that Alabama and Georgia alone do not guarantee post-conviction counsel for any class of inmates).

Discretionary Grants of Capital Postconviction Counsel, 42 Tulsa L. Rev. 253, 268 (2006).

Moreover, while Georgia fails to guarantee counsel, it provides some funding to an appellate resource center that "monitors capital litigation, represents inmates petitioning for state and federal habeas corpus, and seeks pro bono counsel to handle state and federal habeas cases." ABA Georgia Report, *supra*, at 147-48. Alabama, by contrast, "is the only state in the country without a state-funded program to provide legal assistance to death row prisoners to challenge wrongful convictions and death sentences in state postconviction proceedings." EJI *Death Penalty*, *supra*, at 2; *see also* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 353 (2006) (Alabama "does nothing at all to provide its condemned inmates with timely legal assistance in preparing and presenting post-conviction claims."); Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1089-90 (2006) ("The current leading example is Alabama, which has no system at all for providing prefiling assistance to capital prisoners wishing to pursue postconviction actions, known locally as Rule 32 proceedings."). "Alabama has provided [post-conviction] counsel to just one of 95 death row inmates prior to filing; that inmate was actively seeking to be executed." Equal Justice Initiative, *Crisis of Counsel* 2 [hereinafter EJI *Crisis of Counsel*], *available at* http://www.eji.org/eji/files/crisisofcounsel.pdf.

If counsel is appointed for an indigent death row inmate in Alabama, the total fees for handling colla-

teral proceedings are capped at $1,000. Ala. Code § 15-12-23(d). Appointed lawyers in Alabama thus "are either skipping important steps in the representation, or working at rates below the federal minimum wage." EJI *Crisis of Counsel*, *supra*, at 2.

c. Alabama places death row inmates "at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts." Freedman, *supra*, at 1090. For cost and other reasons, however, "in-state organizations and attorneys are incapable of representing all death-sentenced individuals petitioning for state post-conviction relief." ABA Report, *supra*, at 112. Thus, as the State previously explained to this Court, it has created a system of indigent capital defense that relies "on the efforts of typically well-funded out-of-state volunteers." Brief in Opposition at 23, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). But there are not enough volunteers from other states to represent all of Alabama's death row. "[A]s of April 2006, approximately fifteen of Alabama's death row inmates in the final rounds of state appeals had no lawyer to represent them." ABA Report, *supra*, at 112; *see also* Firestone, *supra* (In 2001, "[t]hirty prisoners on Alabama's death row [had] no lawyers to pursue appeals, by far the largest such group in any state."). Today, there are 23 death row inmates in Alabama who are at the end of their direct appeals and need counsel to assist them in state post-conviction proceedings.

Indeed, the official indifference and traps for the unwary exposed in this case only further discourage *pro bono* participation in capital cases. This "cringe-inducing case is causing introspection and angst elsewhere in the legal community, especially among firms, which, like Sullivan, pour a lot of time and

effort into similar pro bono projects." Tony Mauro, *Brief of the Week: In a Capital Case, Trying to Correct a Law Firm's Mistake*, Nat'l L.J., Aug. 4, 2010.

The need for counsel in Alabama is amplified because complex procedural obstacles often thwart inmates' attempts to obtain post-conviction review. "Alabama's post-conviction process is governed by exceptionally complex procedural rules, including unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate this maze. Failure to meet all of the [state law] requirements seals the fate of a condemned inmate." *Barbour* Justices-*amici*, *supra*, at 15; *see also* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 Cornell L. Rev. 435, 446-47 n.64 (2011) ("Alabama requires that any and all claims be pled with a specificity that few counseled, much less uncounseled, inmates can meet.").

In light of the complex procedures and the State's unwillingness to provide counsel to death row inmates, it is no surprise that Alabama courts rarely grant post-conviction relief in capital cases. The State's own statistics show that from 1995 to 2000, Alabama trial courts denied 32 of 33 habeas petitions; the Alabama Court of Criminal Appeals affirmed in 27 of 28 appeals; and the Alabama Supreme Court affirmed in 16 of 17 appeals. *See* Attorney General Bill Pryor, *Alabama Executes Only the Guilty* (July 2000), http://www.ago.state.al.us/issue/guilty.htm. Alabama habeas courts have been criticized for consistently adopting, word for word, draft opinions submitted by the State's lawyers denying post-conviction relief, often on multiple alternative grounds including state law procedural default. *See* Petition for a Writ of

Certiorari at 16-18, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).[3]

C. Alabama's Intransigence

Rather than reform its system in response to the extensive record of documented failures, the State historically has refused to engage on the merits. When asked about the ABA Report, for instance, Alabama's then-Attorney General responded that "[t]he ABA is a liberal, activist organization with an agenda they constantly push. That's why I'm not a member of the ABA." Phillip Rawls, *ABA: Stop the Executions*, Montgomery Advertiser, June 11, 2006 (quoting former Attorney General Troy King). And when asked about the U.N. investigation findings, the then-Attorney General replied, "[t]he United Nations has grievous injustices in its own building that it ought to address before it begins worrying about a speck in the eye of a state like Alabama." Stan Diel, *United Nations Report Calls Alabama's Death Penalty System Broken, Says Innocents May Have Been Executed,* Birmingham News, July 2, 2008 (quoting Mr. King).

Members of Alabama's judiciary have been similarly outspoken. Shortly after this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), for instance, Justice Tom Parker of the Alabama Supreme Court publicly characterized the decision as "blatant judicial tyranny"

---

[3] From 1973 to 1995, 9% of Alabama death penalty judgments were reversed in state post-conviction proceedings. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 53 tbl. 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. During the same period, federal habeas courts found reversible error in 45% of Alabama capital judgments. *Id.* at 62 tbl. 7.

by "the liberal activists on the U.S. Supreme Court." Justice Tom Parker, Op-Ed, *Alabama Justices Surrender to Judicial Activism*, Birmingham News, Jan. 1, 2006. Justice Parker also chastised his colleagues on the State's high court "because they chose to passively accommodate—rather than actively resist—the unconstitutional opinion of five liberal justices on the U.S. Supreme Court" in an Alabama capital case. *Id.* The proper response, Justice Parker wrote, would have been "to decline to follow *Roper* in [that] case." *Id.*

Consistent with these attitudes, the U.N.'s investigator found after meeting with Alabama officials that they "seem strikingly indifferent to the risk of executing innocent people." U.N. Report, *supra*, at ¶ 8. And State officials "have a range of standard responses to due process concerns (which are sometimes seen as 'technicalities'), most of which are characterized by a refusal to engage with the facts." *Id.* When confronted with cases in which death row inmates have been retried and acquitted, "officials explained that a 'not guilty' verdict does not mean the defendant was actually innocent and that most defendants 'played the system' and probably were guilty." *Id.*; *see also id.* at ¶ 16 ("[S]tate officials are considering half-measures they perceive to be money-saving, instead of the necessary establishment of state-wide, well-funded, independent public defender services."); *Barbour* Justices-*amici*, *supra*, at 4-5 (listing numerous failed attempts to reform the system).

One of the consequences of the State's systemic deficiencies and the official indifference is a disproportionately large death row population. Alabama has more death row inmates per capita than any

other state and has the fifth largest death row population of all the states. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2009 - Statistical Tables* 8 tbl. 4 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf; NAACP Report, *supra*, at 38-39. And "[i]n 2010, more people were sentenced to death in Alabama than in Georgia, Maryland, Virginia, Arkansas, South Carolina, Oklahoma, Kentucky, and Louisiana combined." Equal Justice Initiative, *Alabama's Death Sentencing and Execution Rates Continue to be Highest in the Country* (Feb. 3, 2011), http://www.eji.org/eji/node/503. Another tragic consequence is that the Alabama capital system likely has condemned innocent people to death. *See* U.N. Report, *supra*, at ¶¶ 5-9; ACLU Report, *supra*, at 7-13 (listing people who were wrongly convicted of capital offenses).

* * * * *

By virtually all accounts, Alabama's death penalty system is fatally flawed, and State officials charged with implementing the system have resisted change and responded to criticisms with callousness or outright hostility. It is no wonder, then, that when the court clerk in Morgan County received returned notices from petitioner's *pro bono* counsel of record, it took no action to ensure that petitioner learned of the state court's decision. This Court's intervention is needed to correct a manifest injustice to which the State is indifferent.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2500

JONATHAN HACKER
Co-Chair, *Amicus* Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20815
(202) 383-5300

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ARPAN A. SURA
MATTHEW C. PHILLIPS
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

BRIEFS

No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF TEXAS, ARIZONA, DELAWARE, FLORIDA, GEORGIA, IDAHO, LOUISIANA, MISSISSIPPI, NEBRASKA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@oag.state.tx.us

COUNSEL FOR AMICI CURIAE

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

Library of Congress
Law Library

MARTY J. JACKLEY
Attorney General of South Dakota

ROBERT E. COOPER, JR.
Attorney General of Tennessee

MARK L. SHURTLEFF
Attorney General of Utah

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

ROBERT M. MCKENNA
Attorney General of Washington

J.B. VAN HOLLEN
Attorney General of Wisconsin

GREGORY A. PHILLIPS
Attorney General of Wyoming

TOM HORNE
Attorney General of Arizona

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAMELA JO BONDI
Attorney General of Florida

SAMUEL S. OLENS
Attorney General of Georgia

LAWRENCE G. WASDEN
Attorney General of Idaho

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

JIM HOOD
Attorney General of Mississippi

JON BRUNING
Attorney General of Nebraska

GARY K. KING
Attorney General of New Mexico

E. SCOTT PRUITT
Attorney General of Oklahoma

LINDA L. KELLY
Attorney General of Pennsylvania

ALAN WILSON
Attorney General of South Carolina

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 1

Argument 1

I. Providing Maples the Requested Relief Would Unsettle a Settled Question of Law 3

II. The Untenable Nature of Maples's Proposed Limits Demonstrates the Unworkability of His Proposed Rule 5

III. Section 2254(i) Provides an Independent Basis For Denying the Relief Maples Seeks. .7

Conclusion 12

TABLE OF AUTHORITIES

Cases

Carroll v. Sec'y, DOC,
574 F.3d 1354 (11th Cir. 2009) 10

Coleman v. Thompson,
501 U.S. 722 (1991) 1, 2, 4, 7, 11

Cristin v. Brennan,
281 F.3d 404 (3rd Cir. 2002) 4-5

Ellis v. Armenakis,
222 F.3d 627 (9th Cir. 2000) 5

Henderson v. Campbell,
353 F.3d 880 (11th Cir. 2003) 9

Holland v. Florida,
130 S. Ct. 2549 (2010) 7, 10

Howlett v. Rose,
496 U.S. 356 (1990) 3

Johnson v. Singletary,
938 F.2d 1166 (11th Cir. 1991) (en banc) 5

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 7

Moore v. Dretke,
369 F.3d 844 (5th Cir. 2004) (per curiam) 10

Murray v. Giarratano,
492 U.S. 1 (1989) 2

Neal v. Gramley,
99 F.3d 841 (7th Cir. 1996) 5, 7-9

Nichols v. Scott,
69 F.3d 1255 (5th Cir. 1995) 10

Nolan v. Armontrout,
973 F.2d 615 (8th Cir. 1992) 5

Ogan v. Cockrell,
297 F.3d 349 (5th Cir. 2002) 4

Pennsylvania v. Finley,
481 U.S. 551 (1987) 2

Post v. Bradshaw,
422 F.3d 419 (6th Cir. 2005) 8, 10, 11

Spears v. Mullin,
343 F.3d 1215 (10th Cir. 2003) 9

Szabo v. Walls,
313 F.3d 392 (7th Cir. 2002) 9

Wainwright v. Torna,
455 U.S. 586 (1982) (per curiam) 2

Weeks v. Angelone,
176 F.3d 249 (4th Cir. 1999) 4

Wilson v. Corcoran,
131 S. Ct. 13 (2010) (per curiam) 10

Constitutional Provisions, Statutes, and Rules

Sup. Ct. R. 10 4

28 U.S.C. § 2254 8

28 U.S.C. § 2254(a) 10

28 U.S.C. § 2254(i) 1, 7, 9, 11

Other Authorities

Bradford v. Thaler,
No. 09-11519 (U.S.) 6

Foster v. Texas,
No. 10-8317 (U.S.) 6

Kerr v. Texas,
No. 10-10218 (U.S.) 6

INTEREST OF AMICI CURIAE

This case involves the interplay between state and federal habeas. Petitioner seeks a rule that would expand the circumstances under which cases resolved on state habeas via procedural grounds are nevertheless reviewed on the merits in federal habeas proceedings. Amici States thus have a keen interest in the outcome of this case.

SUMMARY OF ARGUMENT

Maples's efforts to distinguish this case from *Coleman v. Thompson*, 501 U.S. 722 (1991), fail—his postconviction attorneys' mistakes caused his procedural default, therefore he is not entitled to federal habeas review of the merits of his claims. Granting Maples an exception to *Coleman* would have implications beyond just the facts of this case.

First, even as Maples attempts to limit this case to its purportedly unique facts, granting Maples relief would inject uncertainty into an area of law where this Court and the courts of appeals are already clear—no cause exists to excuse procedural default when a petitioner's state habeas counsel errs. And second, Maples's limiting principle would prove unworkable, as demonstrated by the number of petitioners who are already seeking review of purported "*Maples* claims." Finally, 28 U.S.C. § 2254(i) provides an additional barrier for Maples's claim that his postconviction counsel's conduct was cause to excuse his procedural default.

ARGUMENT

Maples asserts that "[n]o sustainable system of capital punishment" would preclude federal courts from

excusing his failure to comply with Alabama's appellate deadline and reviewing the merits of his habeas claims. Pet'r Br. 2, 52. But it is Maples, not Respondent, whose argument is in great tension with settled principles regarding the interplay between state and federal habeas.

State habeas corpus is provided as a matter of legislative grace rather than federal constitutional right. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) ("States have no obligation to provide [postconviction] relief."). There is no constitutional right to the assistance of counsel on state habeas. *Giarratano*, 492 U.S. at 10, 12–13; *Finley*, 481 U.S. at 556–57, 559. Thus, there can be no right to have the effective assistance of counsel on state habeas. *Coleman*, 501 U.S. at 752 (Absent a constitutional right to state habeas counsel, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."); *see also Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam). Accordingly, habeas petitioners bear the costs of their attorneys' errors. *Coleman*, 501 U.S. at 754 ("[T]he petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation."). Finally, given the broad sovereign authority States retain over their own judicial functions, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with

utmost caution before deciding that it is obligated to entertain the claim." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). "The general rule . . . is that federal law takes the state courts as it finds them." *Id.* (citation omitted). Maples's request for relief is irreconcilable with these principles.

Thus, even if this were a case in which a petitioner had been truly abandoned and left without counsel during his state habeas proceedings, relief would be unwarranted. But as Respondent made clear, this is not a case of abandonment. Resp't Br. 7–11, 38–45, 51–54. And Respondent forcefully demonstrates that, under the actual circumstances of this case, *Coleman v. Thompson* forecloses the relief Maples seeks. Resp't Br. 15, 18–23.

Amici States fully support Respondent on those points and do not re-argue them here. Rather, the States will make two brief points regarding the practical implications of adopting Maples's rule and urge one additional reason why Maples is not entitled to the relief he seeks.

I. PROVIDING MAPLES THE REQUESTED RELIEF WOULD UNSETTLE A SETTLED QUESTION OF LAW.

In declining to ask the Court to reconsider *Coleman*, Maples is necessarily disavowing his amicus curiae's suggestion that the Court create a new constitutional right to competent state habeas counsel in capital cases. *See* NAACP Br. 23–26. That new right would have no foundation in either the Sixth Amendment or the Due Process Clause. Moreover, recognizing that right at this time would inject

uncertainty into an area of law that is currently clear. The Court should decline the invitation to overturn the long-settled cases that would be necessary to accomplish that task.

Even Maples's narrower request suffers a similar flaw: in order to provide the relief Maples seeks, the Court must inject uncertainty into an area of the law that is currently settled. Typically, the Court prefers to resolve uncertainty, not create it. *See* Sup. Ct. R. 10 (only "compelling reasons"—which generally involve the resolution of a conflict in the lower courts—warrant certiorari review).

Maples's request, in practical effect even if not by its own terms, requires the Court to find that attorneys who fail to file timely appeals provide their clients with cause to excuse procedurally defaulted claims. *Coleman* forecloses this. *Coleman*, 501 U.S. at 754, 756–57 ("Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas."). And the courts of appeals have been faithful in applying this *Coleman* rule. *Ogan v. Cockrell*, 297 F.3d 349, 356–57 (5th Cir. 2002) (noting that the Fifth Circuit has repeatedly rejected claims that ineffective state habeas counsel can constitute cause to overcome procedural bars); *Weeks v. Angelone*, 176 F.3d 249, 272–74 (4th Cir. 1999) (finding that the alleged ineffective assistance of state habeas counsel was not cause to excuse the default of ineffective-assistance-of-trial-counsel claims); *see also, e.g.*, *Cristin v. Brennan*, 281 F.3d 404, 420 (3rd Cir.

2002); *Ellis v. Armenakis*, 222 F.3d 627, 632–33 (9th Cir. 2000); *Neal v. Gramley*, 99 F.3d 841, 843–44 (7th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Johnson v. Singletary*, 938 F.2d 1166, 1174–75 (11th Cir. 1991) (en banc).[1]

The Court should reject Maples's invitation to disrupt this area of law.

II. THE UNTENABLE NATURE OF MAPLES'S PROPOSED LIMITS DEMONSTRATES THE UNWORKABILITY OF HIS PROPOSED RULE.

Maples's petition presented, and the Court granted certiorari on, a narrow, fact-bound question: Can (1) a blameless petitioner, (2) who had attorneys no longer functioning as his agents, establish cause when (3) the State's own conduct contributed to the default? Pet'r Br. i. For any habeas petitioner (including Maples) who cannot establish these factual predicates in his own case, the Court's resolution of the question presented will afford no relief.

Yet, a number of recent petitioners raising unrelated questions have alleged that they are raising "*Maples* issues" requiring the Court's review. This

---

1. Maples might try to distinguish these cases by repeating his claim that "abandonment" by counsel differs from ineffective or poor counsel. But a claim that Maples had no attorney when he missed his filing deadline is contrary to the facts in this case. Resp't Br. 7–11, 38–45, 51–54. Thus, to provide Maples relief, the Court would be required to recognize that the garden-variety failures of Sullivan & Cromwell LLP, Marc De Leeuw, and John Butler in missing the Alabama filing deadline now serve as cause to excuse procedural default.

attempted expansion is unsurprising, especially given the narrowness of the question.[2] Nevertheless, these petitions only further demonstrate what this case makes clear: Maples's argument contains no true, workable limiting principle.

In *Foster v. Texas*, No. 10-8317 (U.S.), the petitioner sought leave to file an out-of-time petition for rehearing and asserted that the grant of certiorari in this case warranted review of his claims that his habeas counsel was not functioning as his agent because he asserted the wrong claims in his case. *Foster v. Texas*, No. 10-8317 (U.S.), Petition for Rehearing of Order Denying Petition for Writ of Certiorari 6–7. Similarly, the petitioner in *Bradford v. Thaler*, No. 09-11519 (U.S.), sought rehearing (citing the Maples certiorari grant) on a petition raising claims that his attorney asserted the wrong habeas claims. *Bradford v. Thaler*, No. 09-11519 (U.S.), Petition for Rehearing of Order Denying Petition for Writ of Certiorari 4. Again, the petitioner deemed raising the wrong arguments as conduct so deficient that counsel no longer served as petitioner's agent. *Id.*; *see also Kerr v. Texas*, No. 10-10218 (U.S.), Petition for Writ of Certiorari to the Texas Court of Criminal Appeals 13.

These petitioners' claims that they were without counsel are overblown; if all a petitioner needed to do to establish "abandonment" and satisfy the "cause"

---

2. Perhaps emboldened by these petitioners' efforts, Maples himself has now tried to expand upon that narrow question by asking the Court to conduct a prejudice inquiry as well. Pet'r Br. 22 n.2.

showing was to come up with any new claim or argument that an attorney did not raise, then overcoming procedural default would pose no challenge.

Maples's contention is also overblown in light of the fact that both Butler and De Leeuw were, at all times, Maples's postconviction counsel. Try as he might, Maples cannot show that *Holland v. Florida*, 130 S. Ct. 2549 (2010), rather than *Coleman*, controls this case. And it makes sense to treat Maples and Coleman the same way. Whether the filing deadline is missed by days (Coleman) or weeks (Maples) the end result is the same: procedural default due to the conduct of postconviction counsel.

III. Section 2254(i) Provides an Independent Basis For Denying the Relief Maples Seeks.

Maples asks the Court to excuse his procedural default on the ground that it was caused by his state habeas counsel, who he asserts abandoned him. But under 28 U.S.C. § 2254(i), the failures of postconviction counsel cannot provide grounds for that relief.

Section 2254(i) states: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

In *Neal v. Gramley*, the Seventh Circuit noted that "procedural defaults due to the blunderings of [counsel in postconviction proceedings] are not to be excused." 99 F.3d 841, 843 (7th Cir. 1996) (Posner, C.J.) (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8–9 (1992); *Coleman*, 501 U.S. at 752–53). The Seventh Circuit

added that "the new habeas corpus statute confirms [this] by providing explicitly that incompetence of counsel in postconviction proceedings, state or federal, is not a ground for relief in federal habeas corpus." *Neal*, 99 F.3d at 843 (citing 28 U.S.C. § 2254(i)). The Court thus concluded:

> It follows directly from the Supreme Court's rulings and the new statute that procedural defaults caused by counsel in state postconviction proceedings will not get the applicant for federal habeas corpus a more favorable standard of review or let him present evidence that a state court has held to be barred as a result of the default.

Id.

Similarly, in *Post v. Bradshaw*, a habeas petitioner filed a Rule 60(b) motion to vacate a judgment denying habeas relief in order to undertake limited discovery. 422 F.3d 419, 421 (6th Cir. 2005). The district court found that postconviction counsel's failure to pursue discovery was "inexcusable neglect" and stated its intention to grant the motion, so the petitioner moved in the Sixth Circuit for a remand of the case. *Id.* The Sixth Circuit denied the motion and explained that the motion "seeks relief from the judgment entered in [the] habeas proceeding brought under 28 U.S.C. § 2254." *Id.* at 421, 423. And the motion sought that relief based upon postconviction counsel's failure to seek discovery. *Id.* at 423. The Sixth Circuit concluded:

> [I]t is clear that, whatever appellation we might apply to counsel's neglect, the ground on

> which Post seeks relief in this Rule 60(b) motion is the incompetent and ineffective representation he received during that federal post-conviction collateral review. But relief on that ground is not permitted under AEDPA.

Id. And, critically, section 2254(i) "bars 'relief,' not simply particular kinds of relief, such as a writ of habeas corpus. We conclude, therefore, that the relief Post seeks is explicitly barred by the provisions of § 2254(i)." *Id.* *See also Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (noting that section 2254(i) codified the rule that ineffective postconviction counsel is not cause to excuse procedural default); *Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) ("[I]neffective representation in state post-conviction proceedings is inadequate to excuse a procedural default") (citing 28 U.S.C. § 2254(i)); *Szabo v. Walls*, 313 F.3d 392, 396–97 (7th Cir. 2002) (Easterbrook, J.).

Thus, in these cases "relief" was read to mean more than just a writ of habeas corpus. And this is the reading of section 2254(i) that makes sense. Suppose the word "relief" is read narrowly to encompass only a writ of habeas corpus, then section 2254(i) would in effect say: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for [a writ of habeas corpus] in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). But, of course, counsel errors in a habeas proceeding are not a basis for granting a writ of habeas corpus. Obtaining a writ of habeas corpus requires the petitioner to show "that he is in custody in violation of the Constitution or laws

or treaties of the United States." 28 U.S.C. § 2254(a). As the Supreme Court recently noted, "[f]ederal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law." *Wilson v. Corcoran*, 131 S. Ct. 13, 14 (2010) (per curiam). And because postconviction errors—no matter how serious—occur in a proceeding collateral to the state court judgment on which custody is based, those errors cannot affect the legality of the underlying custody. *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself.") (internal quotation marks and citation omitted); *see also, e.g.*, *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) ("[D]efects in state collateral proceedings do not provide the basis for [federal] habeas relief."); *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) (per curiam). Reading section 2254(i) to preclude only a writ of habeas corpus based on the errors of state postconviction counsel would render section 2254(i) a superfluous addition, because section 2254(a) already precluded such claims prior to the enactment of AEDPA. *See Post*, 422 F.3d at 423 n.1.[3]

Maples asks the Court to find that postconviction counsel's conduct can serve as cause for his procedural default. The "ground" upon which Maples relies is most

---

3. In *Holland v. Florida*, the Court noted that the petitioner did not argue that his counsel's conduct provided a substantive ground for relief. 130 S. Ct. 2549, 2563 (2010).

certainly the "ineffectiveness or incompetence" of his postconviction counsel.[4] 28 U.S.C. § 2254(i). And what Maples seeks—the ability to obtain merits review of defaulted habeas claims—is "relief" within the most appropriate reading of section 2254. *See Post*, 422 F.3d at 423 n.1. Maples's postconviction-counsel-based request to obtain merits review of his habeas claims despite his default is foreclosed by section 2254(i).

One final note: section 2254(i) was added to the habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), after the Court's *Coleman* decision made clear that postconviction attorney errors do not provide cause to excuse procedurally defaulted claims. *See Coleman*, 501 U.S. at 754, 756–57. Section 2254(i) thus demonstrates congressional approval of the *Coleman* decision and the underlying principle that postconviction counsel error does not give rise to *any* kind of relief in a proceeding arising under section 2254. Maples's attempt to create an exception to *Coleman* (even were he correct on his abandonment theory) is contrary to AEDPA and should therefore be rejected.

---

4. The use of the phrase "ineffectiveness or incompetence of counsel" is also worth noting, because it suggests at least two things: (1) congressional recognition that ineffective assistance of state habeas counsel does not exist as a claim, because there is no right to such assistance; and (2) section 2254(i) is meant to include something more than just the traditional errors that would be deemed ineffective assistance. As pertaining to this case, attorney "incompetence" should be read to include things like failing to withdraw and failing to file an appearance, even if the Court believes such conduct amounts to abandonment.

CONCLUSION

The Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@oag.state.tx.us

COUNSEL FOR AMICI CURIAE

July 7, 2011